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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

CHARLOTTE E. NEUBAUER,
personally and as personal
representative of the Estate
of Clifford S. Neubauer, et al.,

Petitioners,

v.

OWENS-CORNING FIBERGLAS CORP.,
et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Does the Court of Appeals' interpretation of the Wisconsin statute of limitations as to the time of accrual of a cause of action for asbestos-caused disease deprive the petitioners of a remedy for a wrong and deprive them of due process of law?

LIST OF PARTIES

The following is a list of all parties to the proceeding in the Court of Appeals:

Plaintiffs-Appellees-Cross-Appellants

Charlotte E. Neubauer, personally and as personal representative of the Estate of Clifford S. Neubauer

Joy Skofronick, personally and as personal representative of the Estate of Clifford E. Mason

Walter J. Presechnik

Clarence O. Reimer and Mary M. Reimer

Darwin Frank Witkowski, Sr., and Eleanore Witkowski

Clarence P. Lillge and Hertha E. Lillge

Erich E. Eckholdt and Mamie Eckoldt

Robert J. Gaynor and Lavellette Gaynor

William Globig and Kathrine A. Globig

Robert A. Wetzel and Grace M. Wetzel

Defendants-Appellants-Cross-Appellees

Johns-Manville Sales Company

Owens-Corning Fiberglas Corp.

Transcontinental Insurance Co.

Third-Party Defendants-Appellants-
Cross-Appellees

Owens-Illinois, Inc.

Pittsburgh Corning Corp.

Keene Corporation

Eagle-Picher Industries, Inc.

Jim Walter Corp.

Celotex Corp.

Fibreboard Corp.

GAF Corp.

Atlas Asbestos Co.

H. K. Porter Co., Inc.

Southern Asbestos Company

Forty-Eight Insulations, Inc.

Standard Asbestos Manufacturing and
Insulating Co.

Unarco Industries, Inc.

Armstrong Cork Co.

Rock Wool Manufacturing Co.

Certain-Teed Products Corp.

Turner-Newall, Ltd.

Nicolet, Inc.

Raybestos Manhattan, Inc.

Ryder Industries, Inc.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals is reported as Neubauer v. Owens-Corning Fiberglas Corp., 686 F.2d 570 (7th Cir. 1982). It is reproduced as Appendix A, pp. 1A-30A, infra. The opinion of the District Court is reported as Neubauer v. Owens-Corning Fiberglas Corp., 504 F.Supp. 1210 (E.D. Wis. 1981). It is

reproduced as Appendix B, pp. 31A-50A, infra.

JURISDICTION

The judgment of the Court of Appeals was entered on August 13, 1982. A timely petition for rehearing was denied on September 16, 1982. (Appendix C, pp. 51A-52A, infra. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves sections 893.14 and 893.205(1) of the Wisconsin Statutes (1977); Amendments V and XIV to the United States Constitution; and Article I, section 9 of the Wisconsin Constitution.

Section 893.14, Wis. Stats. 1977:

> "893.14 Actions, time for commencing. The following actions must be commenced within the periods respectively hereinafter prescribed after the cause of action has accrued except that the period shall not be considered to have expired when the court before which the action is pending shall be satis-

fied that the person originally served knowingly gave false information to the officer with intent to mislead him in the performance of his duty in the service of any summons or civil process. In the event the court so finds the period of limitation shall be extended for one year."

Section 893.205, Wis. Stats. 1977:

"893.205 Within 3 years. Within 3 years:

"(1) An action to recover damages for injuries to the person for such injuries sustained on and after July 1, 1955, unless notice in writing as provided in s. 330.19(5), 1955 statutes, was served prior to July 1, 1959, in which event s. 330.19(5), 1955 statutes, shall apply. But no action to recover damages for injuries to the person, received without this state, shall be brought in any court in this state when such action is barred by any statute of limitations of actions of the state or country in which such injury was received unless the person so injured shall, at the time of such injury, have been a resident of this state.

"(2) An action brought to recover damages for death caused by the wrongful act, neglect or default of another where death resulted on or after July 1, 1955.

"(3) Any civil action arising under ch. 11 or subch. III of ch. 13."

Article V of the Amendments to the United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Article XIV of the Amendments to the United States Constitution:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, section 9 of the Wisconsin

Constitution:

> "Remedy for wrongs. SECTION 9. Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without denial, promptly and without delay, comformably to the laws."

STATEMENT OF THE CASE

I. Statement of Facts

The plaintiffs or decedents in each of these products liability cases were insulation workers by trade whose employment involved the use of asbestos-containing thermal insulation products. Suits were brought against several asbestos insulation manufacturers seeking damages for injuries or death allegedly resulting from exposure to such asbestos insulating products. All actions were consolidated for pre-trial purposes by the District Court on December 4, 1979.

In the wrongful death actions of

Neubauer and Skofronick, the plaintiffs claim that death resulted from a form of cancer known as mesothelioma which is alleged to be caused by exposure to asbestos fibers. In the remaining eight actions, the alleged injury is asbestosis, a lung disease which involves fibrosis of the lungs, pleural thickening, pleural plaques and shortness of breath.

A. Facts Pertinent To The Claim Of Joy Skofronick

The action of Joy Mason Skofronick was commenced by service of a Summons and Complaint filed on July 15, 1977, in which she seeks to recover for the wrongful death of Clifford Mason, as well as damages for his conscious pain and suffering and hospital and medical expenses. She alleges that her husband died of cancer contracted as the result of exposure to asbestos. In June of 1974, the decedent developed belching, burping, epigastric distress and abdominal

bloating as the result of abdominal cancer. He died on September 28, 1974.

The decedent, Clifford E. Mason, was not informed that he had a disease arising from exposure to asbestos fiber prior to July 16, 1974. He was advised that he had no significant abnormalities prior to that time.

B. Facts Pertinent To The Claim Of Walter J. Presechnik

The action of Walter Presechnik was commenced by service of a Summons and Complaint dated August 2, 1977.

Mr. Presechnik's lung problems go back to the 1950's as evidenced by a radiologist's report of January 31, 1964, which states he had bilateral pulmonary fibrosis since 1957. Dr. Nathan Grossman testified on October 6, 1980, that bilateral pulmonary fibrosis is a phrase used by doctors reporting on patients that have asbestosis and that the bilateral pulmonary fibrosis was caused by exposure to

asbestos. Mr. Presechnik also had a tendency to develop pneumonia and had swelling of the ankles in 1970, both of which are characteristic of people suffering from asbestosis.

Dr. Donald Schleuter, a pulmonary function specialist, reviewed the medical records of Walter Presechnik and it is his opinion that the plaintiff had asbestosis for several years prior to November 19, 1974, the date asbestosis was diagnosed by Dr. Bindschalder.

Walter J. Presechnik did not have symptoms or complaints due to asbestosis prior to August 2, 1974.

C. Facts Pertinent To The Claim Of Clarence O. Reimer

Clarence Reimer's action was commenced on June 2, 1977, by the filing and service of a Summons and Complaint.

Mr. Reimer was examined by Dr. Nathan Grossman on November 16, 1974, and the office records of the examination show that he had

severe asbestosis as of that date. Dr. Grossman traced the history of asbestosis during his deposition of October 6, 1980, and stated that it would have existed for a minimum of ten years and for as long as twenty years before the disease would reach the stage seen in Mr. Reimer in 1974.

A pulmonary function specialist, Dr. Donald Schleuter, reviewed the medical records of Mr. Reimer and agreed with Dr. Grossman that the plaintiff had asbestosis for several years prior to November 16, 1974.

Clarence O. Reimer had no symptoms, complaints or disability relative to his lungs, his physical being, his endurance or capacity to do his work prior to June 2, 1974. He was not informed or knew that he had asbestosis until November 16, 1974. He first became aware of a deficiency in his physical condition in October, 1974. There had been no prior examinations resulting in medical records of any symptoms or lung changes prior to October, 1974.

D. Facts Pertinent To The Claim Of Darwin Frank Witkowski

Darwin Frank Witkowski's action was commenced by the service of a Summons and Complaint dated and filed January 25, 1978.

Mr. Witkowski was treated in 1974 by Dr. David C. Mountain, deceased, whose practice was subsequently taken over by Dr. Kanak K. Shah. Dr. Shah was deposed on October 6, 1980, and testified that based on his review of Dr. Mountain's records and his own examination and treatment of Mr. Witkowski, the plaintiff had asbestosis as of June 27, 1974.

An examination was also conducted by Dr. Mountain on August 19, 1974, and the records show a diagnosis of asbestosis. As a result of that examination, a statement was sent to CNA Insurance Company on August 26, 1974, conveying the diagnosis of pulmonary fibrosis, which his doctor explained in Mr. Witkowski's case means asbestosis.

Darwin Frank Witkowski had no symptoms,

complaints or disability relative to his lungs, his physical being, his endurance or capacity to do his work prior to January 25, 1975. He had no respiratory symptoms until 1976.

E. Facts Pertinent To The Claim Of Clarence Lillge

Clarence Lillge commenced his action by service of a Summons and Complaint dated January 25, 1978.

On April 22, 1975, Mr. Lillge was examined by Dr. Nathan Grossman as a routine OSHA examination of asbestos workers, and it was found that there was progression of the asbestosis which he had on June 31, 1969. The basis for this diagnosis was chest x-rays taken of Lillge on June 31, 1969, which showed pleural calcification involving the right and left walls which is an indication of asbestosis.

Clarence P. Lillge had no symptoms, complaints or disability relative to his lungs, his physical being, endurance or capacity to

work prior to January 25, 1975. He was not informed and did not know that he had asbestosis until November 19, 1976. He first noticed remarkable tiredness approximately one year prior to May 31, 1976.

F. Facts Pertinent To The Claim Of Erich Eckoldt

Erich Eckoldt's action was commenced by the service of a Summons and Complaint which was filed March 3, 1978.

On February 9, 1974, Mr. Eckoldt was examined by Dr. Nathan Grossman during which a lung dysfunction study was conducted. Mr. Eckoldt did not fully cooperate in the study, and Dr. Grossman was unable to determine the extent of dysfunction; however, chest x-rays showed a thickened pleura on the left lateral chest and pleural paracardial adhesion at the mid-portion of the left ventricle. Based upon these findings and the history given by Mr. Eckoldt, Dr. Grossman testified on October 6, 1980, that Erich Eckoldt had

asbestosis on February 9, 1974.

Additionally, Mr. Eckoldt complained of shortness of breath in 1974, and Dr. Grossman testified that exposure to asbestos fibers was a major consideration with regard to that problem.

Erich E. Eckoldt did not have any symptoms, complaints or disability relative to his lungs, physical being, endurance or capacity to work due to asbestosis until approximately November, 1977. He was not informed and did not know he had asbestosis until November 11, 1977.

G. Facts Pertinent To The Claim Of Robert Gaynor

The action of Robert Gaynor was commenced by service of a Summons and Complaint dated August 18, 1978.

On June 15, 1974, a lung dysfunction study was conducted of Mr. Gaynor by Dr. Nathan Grossman. That study found his forced vital capacity was 63% of the pre-

dicted value, the forced expiratory volume 68% of the predicted value, and the forced expiratory flow 83% of the predicted value. A radiographic exam revealed type T irregular small opacities involving at least the lower two-thirds on the left side and almost three zones on the right side. It also showed pleural plaques on the right and left sides and calcification in both diaphragms.

Dr. Grossman testified at a deposition on October 6, 1980, that Robert Gaynor suffered from severe asbestosis as of June 15, 1974, and that the results of the lung dysfunction study were not inconsistent with such diagnosis.

Robert Gaynor had no conscious symptoms, complaints or disability relative to his lungs, his physical being, his endurance or capacity to do his work prior to August 18, 1975, that was associated with or related to contact with asbestos fiber. He first became aware of any deficiency in his physical condition on October 25, 1975.

H. Facts Pertinent To The Claim Of William Globig

William Globig's action was commenced by service of a Summons and Complaint dated February 16, 1979.

Mr. Globig was seen by Dr. Nathan Grossman on May 14, 1975, at which time a lung dysfunction study was conducted. The study showed Globig's forced vital capacity to be 78% of the predicted value, the forced expiratory flow was 83% of the predicted value and the forced expiratory volume as 85% of the predicted value. Dr. Grossman also found thickening of the pleura on the left side which was caused by his exposure to asbestos.

At a deposition on October 6, 1980, Dr. Grossman testified that William Globig had asbestosis as of May 14, 1975.

William Globig had no symptoms, complaints, or disability relative to his lungs, his physical being, his endurance or capacity to do his work prior to February 16, 1976.

He was not informed and did not know he had asbestosis until 1977. He first became aware of a deficiency in his physical condition on July 11, 1978.

I. Facts Pertinent To The Claim Of Robert Wetzel

Robert A. Wetzel commenced his action by the filing of a Summons and Complaint dated November 19, 1979.

Mr. Wetzel was examined by Dr. Nathan Grossman on June 8, 1974, as part of a regular series of examinations required by OSHA of asbestos insulation workers. A lung dysfunction study was performed at that time which revealed Mr. Wetzel's forced vital capacity to be 76% of the predicted value, the forced expiratory volume was 78% of the perdicted value, and his forced expiratory flow was 81% of the predicted value. X-rays taken that day showed a triangular area of fibrosis involving the right mid lung field, an air bronchogram above the

triangular shadow and a right pleural plaque.

Dr. Grossman was deposed on October 6, 1980, and testified that Robert Wetzel was diagnosed as having asbestosis on June 8, 1974, and further, there was lung dysfunction consistent with the diagnosis of asbestosis as of that date.

Robert A. Wetzel never had any symptoms, complaints or disability relative to his lungs, his physical being, his endurance or capacity to work associated with asbestosis until just prior to October 6, 1979. He was never informed and did not know he had asbestosis until November 10, 1979.

II. The Proceedings in the Trial Court

The District Court had jurisdiction of these cases under 28 U.S.C. §1332.

All of the defendants and third-party defendants moved the District Court for summary judgment in each of the actions, with the exception of the Neubauer case, on the grounds that the actions were barred by

the Wisconsin statute of limitations. On January 9, 1981, the District Court, in a written decision, denied all of the motions for summary judgment. In its decision, the District Court, applying Wisconsin law, ruled that the statute of limitations in cases of this nature begins to run on the date of the injured person's last exposure to the disease-causing substance. The motions for summary judgment were denied because none of the parties addressed themselves to the question of the date of the last exposure.

On April 6, 1981, the District Court certified its decision and order for appeal, pursuant to 28 U.S.C. §1292(b).

All parties petitioned the Court of Appeals for permission to appeal, and such permission was granted on June 3, 1981. (Appendix D, pp. 53A-56A, infra.)

III. The Proceedings in the Court of Appeals.

The United States Court of Appeals for the Seventh Circuit held that a cause of

action for asbestos-caused disease accrues, and the Wisconsin statute of limitations begins to run, when the disease becomes medically diagnosable without regard for any noticeable impairment to the plaintiff. Since the plaintiffs in each of these cases had a diagnosable disease more than three years before they brought suit, the Court remanded these cases to the District Court for further proceedings.

REASONS FOR GRANTING THE WRIT

The Court of Appeals' Interpretation Of The Wisconsin Statute Of Limitations Deprives The Petitioners Of A Remedy For A Wrong And Deprives Them Of Due Process Of Law.

The Court of Appeals has interpreted secs. 893.14 and 893.205, Wis. Stats. 1977, so that a cause of action for an asbestos-caused disease accrues, and the period of limitations begins to run, when the disease is first medically diagnosable. When so construed, the statutes operate to deprive

the petitioners of a remedy for a wrong guaranteed to them by article I, section 9 of the Wisconsin Constitution, and to deprive them of property without due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

This Court long ago held that a right of action to recover damages for an injury is property protected by the constitutional guarantee of due process. Angle v. Chicago, St. P., M. & O. R. Co., 151 U.S. 1, 19 (1893). Similarly, the Wisconsin Supreme Court has held that a cause of action is a right which is protected by both the Fourteenth Amendment to the United States Constitution and article I, section 9, of the Wisconsin Constitution, which guarantees to every person "a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property or character". Rosenthal v. Kurtz, 62 Wis.2d 1, 8, 12, 213 N.W.2d 741, 744, 746, 216 N.W.2d 252 (1974).

This Court also held long ago that a

statute of limitations deprives one of property without due process of law if, in its application to an existing right of action, it unreasonably limits the opportunity to enforce that right by suit. Wheeler v. Jackson, 137 U.S. 245, 258 (1890). Similarly, the Wisconsin Supreme Court has also held that a statute of limitations might offend both the Fourteenth Amendment to the United States Constitution and article I, section 9 of the Wisconsin Constitution if it extinguished the right of a plaintiff to sue for damages prior to the time when the plaintiff could prove the existence of an injury. Kallas Millwork Corp. v. Square D Co., 66 Wis.2d 382, 393, 225 N.W.2d 454, 460 (1975); Rosenthal v. Kurtz, supra, at 8, 12, 213 N.W.2d at 744, 746. It is the petitioners' position that the Court of Appeals' interpretation of the Wisconsin statutes deprives them of a remedy prior to the date of injury, and thus, prior to any cause of action having arisen. Therefore, such an application of

the statutes is violative of both the United States and Wisconsin Constitutions.

"A cause of action accrues where there exists a claim capable of present enforcement, a suable party against whom it may be enforced, and a party who has a present right to enforce it." (Emphasis supplied.) Barry v. Minahan, 127 Wis. 570, 573, 107 N.W. 488, 490 (1907), quoted with approval in United States Fire Ins. Co. v. E. D. Wesley Co., 105 Wis.2d 305, 310, 316, 313 N.W.2d 833, 835, 838 (1982); Holifield v. Setco Industries, Inc., 42 Wis.2d 750, 754, 168 N.W.2d 177, 179 (1969). In order to have a tort claim capable of present enforcement, the plaintiff must have sustained damages. United States Fire Ins. Co. v. E. D. Wesley Co., supra, at 316, 313 N.W.2d at 838; Holifield v. Setco Industries, Inc., supra, at 755, 168 N.W.2d at 180. The damages must be sufficient so that the plaintiff "can come into court, plead and prove certain facts and secure the relief requested". Holifield v. Setco Industries, Inc., supra,

at 754, 168 N.W.2d at 179. Thus, a cause of action should accrue when the damages are sufficiently established, so as not to be too speculative to permit recovery.

The Court of Appeals in these cases has held that a cause of action for an asbestos-caused disease accrues at the time when the disease is first medically diagnosable. At the time the disease is first diagnosed, however, the disease may not be impairing the plaintiff's health, and the plaintiff may not be suffering from any of the disabling effects of the disease. Yet under the Court's interpretation of the Wisconsin statutes, the plaintiff would be forced to commence a personal injury action as soon as any vestigial sign is noted. At that time, the plaintiff would be forced to seek damages for all past, present and future injuries resulting from his exposure to asbestos, or risk having a claim for any of such damages barred by the statute of limitations, as occurred in these cases. The

plaintiff would have to seek damages, not only for the diagnosed physiological change in his body but for all consequences that might develop in the future, including any future disability or impairment of health resulting from the asbestosis, and separate and distinct illnesses which may result from exposure to asbestos, such as mesothelioma or other forms of cancer.

However, it is the rule in Wisconsin that in order to recover damages based on future consequences, the plaintiff must prove that such consequences are "reasonably certain" to result from the injuries sustained. Recovery of damages for "possible" or speculative future consequences is not permitted. See: Hargrove v. Peterson, 65 Wis.2d 118, 125, 221 N.W.2d 875, 879 (1974); Kincannon v. National Indemnity Co., 5 Wis.2d 231, 238, 92 N.W.2d 884, 888 (1958); Kowalke v. Farmers Mut. Automobile Ins. Co., 3 Wis.2d 389, 406, 407, 88 N.W.2d 747, 756 (1958). To meet the "reasonably certain"

standard, the plaintiff must prove by a preponderance of the evidence that the consequence will occur. Sufferling v. Heyl & Patterson, 139 Wis. 510, 518, 121 N.W. 251, 254 (1909). If the alleged future effect is so proven, the plaintiff may be awarded full compensation for it; however, if the plaintiff fails to meet his burden, his award must be limited to damages for injuries he has already sustained.

At the time that a person brings suit for diagnosed asbestosis, he may not be able to prove to a reasonable certainty that such disease will cause disability or that a more serious disease will develop later. His claim for future disability, which probably would be his main consequential damages, would be in danger of not being adjudicated. Recovery for injury he suffered would be barred for him.

On the other hand, if a plaintiff, as did the petitioners in these cases, delays commencement of his action until he is

actually suffering the disabling effects of asbestosis -- which may be several years after the disease is first medically diagnosable -- in order to have sufficient proof of damages, his case will be dismissed as untimely, as would happen in these cases.

Thus, the effect of the Court of Appeals' decision is to bar a plaintiff from recovering for asbestos-caused injuries which develop subsequent to the actual diagnosis of asbestosis. If a plaintiff brings suit within three years from the date the asbestos-caused changes appear, his claim for future disability may be dismissed for lack of proof. On the other hand, if he delays commencement of an action until he has sufficient proof of disability, which may be several years after the first changes are noted, his action will be dismissed as untimely.

A cause of action cannot accrue until "there exists a claim capable of present enforcement". Barry v. Minahan, supra, at 573, 107 N.W. at 490. However, the Court

has interpreted the Wisconsin statutes in such a manner that the period of limitations commences to run when the plaintiff's damages may be too speculative to permit recovery. Thus, the statutes, as construed by the Court, deprive the plaintiff of a remedy before he has a cause of action, in violation of article I, section 9 of the Wisconsin Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

The Court of Appeals itself stated that it "would be most unfair to hold that the period of limitations had begun running before the plaintiff can possibly prove a cause of action", Neubauer v. Owens-Corning Fiberglas Corp., 686 F.2d 570, 573 (7th Cir. 1982). The Court recognized that such a holding would run afoul of article I, section 9 of the Wisconsin Constitution. Rather, the Court stated that the limitations period does not begin to run until the plaintiff's damages are sufficiently established so that he could bring suit immediately without his

damages being too speculative. Therefore, the Court rejected Owens-Illinois' argument that a cause of action for asbestosis accrues when the plaintiff is exposed to asbestos, because the Court recognized that an asbestos-caused injury is not provable in court until some undetermined time after the plaintiff's initial exposure to asbestos.

Similarly, the disabling effects of diagnosable asbestosis may not be provable in court until some undetermined time after the disease is first diagnosable. Yet the Court held that the limitations period begins to run at the time the disease is diagnosable. The Court has in effect held that the period of limitations begins to run before a plaintiff is able to prove the future injuries which will result from his diagnosable asbestosis. The Court has held, therefore, that the period begins to run before the plaintiff's cause of action has accrued. Such an interpretation of the Wisconsin statutes deprives the petitioners of prop-

erty without due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution, and deprives them of a remedy for a wrong guaranteed to them by article I, section 9 of the Wisconsin Constitution.

It is the position of the petitioners that an interpretation of the Wisconsin statutes which would not offend such constitutional provisions is a determination that the statute of limitations in an action for asbestos-caused disease does not begin to run until physical impairment from the disease has manifested itself. It is only at this time that the plaintiff has sufficient proof of damages so as to enable him to enforce his claim in court.

Such a view was adopted by the Court in Karjala v. Johns-Manville Products Corp., 523 F.2d 155 (8th Cir. 1975), a case involving a claim for asbestosis where the appellant contended that the Court's instruction on the statute of limitations was

erroneous. Initially, the Court pointed out that the statute of limitations does not begin to run until damage has resulted:

> "...We recently examined the commencement of the statute of limitations in Minnesota and concluded that:
>
> "'[i]n Minnesota, *** the statute does not begin to run until damage has resulted. It is not necessary for the final or ultimate damages to be known or predictable, however, the statute begins to run when some damage occurs which would entitle the victim to maintain a cause of action.'" Id. at 160.

Thus, Minnesota's rule is similar to Wisconsin's in that damages are an essential element of a negligence cause of action and the cause of action cannot accrue, or the statute of limitations begin to run, until damages have been sustained.

More specifically, in commenting on the effect of the Minnesota law, the Court in Karjala stated that the statute only begins to run when there has been some harm or impairment manifesting itself:

> "Thus, under Minnesota law, an instruction on the statute of limitations

> must be couched in terms of when damage has resulted from the alleged breach of duty, that is, the time when a claim could be brought in a court of law without dismissal for failure to state a claim; in a personal injury action this occurs when some harm or impairment has manifested itself which can be shown to have been caused by an act or omission for which the defendant would be liable..." (Emphasis supplied.) Id. at 160.

The Court approved the instruction to the jury since it was in accordance with the Minnesota law stated above. The instruction charged the jury as follows:

> "Now, with regard to the statute of limitations, the law requires that Mr. Karjala bring his claim to court within six years of the date his claim arises. That is, in order to avoid stale claims, in fairness to the defendant, you shouldn't be able to have a claim and sort of lay in the weeds and wait and wait and wait and then bring it. The defendant might not have any idea what it is about at that time. But they assume that six years is a fair time to wait, and that is what they say, you can't bring it after six years.
>
> "His claim arises when the harm to his person becomes evident. However, contracting asbestosis is not a matter of moment, or an occasion, but something which develops over a

> long period of time. The statute doesn't commence to run against Mr. Karjala until he has contracted the disease of asbestosis, and the process of contracting the disease does not cease until physical impairment manifests itself.
>
> "In other words, the disease must have progressed to a stage when Mr. Karjala would have a provable legal claim for his injuries, to the point when he would have a provable claim that he could go into court and prove. Now, if you find that he could have brought a case for asbestosis during that period of time that he continued to work and could have put in a claim and would and should have known that he had a claim based on reasonable expectation and so forth, then he had to bring it within six years of 1972 - ..." (Emphasis supplied.) Id. at 159-160.

A cause of action for an asbestos-caused disease cannot accrue until "there exists a claim capable of present enforcement". Barry v. Minahan, supra, at 573, 107 N.W. at 490. A plaintiff can only enforce his claim when the damages are sufficiently established so as to permit a recovery. Only when physical impairment from the disease has manifested itself does a plaintiff have sufficient proof of damages. Therefore, it is at this time

that the cause of action should accrue. Unlike the Court of Appeals' interpretation of the Wisconsin statutes, such an interpretation would be consistent with due process and insure a plaintiff of a remedy for a wrong.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

GOLDBERG, PREVIANT, UELMEN, GRATZ, MILLER & BRUEGGEMAN, S.C.

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APPENDIX A

OPINION OF THE COURT OF APPEALS

CHARLOTTE E. NEUBAUER, et al.,

Plaintiffs-Appellees,
Cross-Appellants,

v.

OWENS-CORNING FIBERGLAS CORP., et al.,

Defendants-Appellants,
Cross-Appellees,

v.

PITTSBURGH CORNING CORP., et al.,

Third Party Defendants-
Appellants, Cross-
Appellees.

Nos. 81-8021 to 81-8033 and 81-1939
to 81-1951.

United States Court of Appeals,
Seventh Circuit.

Argued February 24, 1982
Decided August 13, 1982
As Amended August 18, 1982
Rehearing Denied September 16, 1982

Appeal from the United States District Court
for the Eastern District of Wisconsin.

Before CUMMINGS, Chief Judge, STEWART, Justice (Retired),* and ESCHBACH, Circuit Judge.

CUMMINGS, Chief Judge.

These appeals require us to determine when the Wisconsin statute of limitations for personal injuries begins running against causes of action for asbestos-caused diseases.

The plaintiffs or decedents in each of the ten cases below were insulation workers who were exposed to insulation containing asbestos. In two of the cases the insulation workers died from mesothelioma, a cancer that allegedly is caused by exposure to asbestos fibers. In the remaining eight cases the workers suffer from asbestosis, a lung disease involving fibrosis of the lungs, pleural thickening, pleural plaques, and shortness of breath. For a detailed description of asbestosis, see Porter v. American

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* The Honorable Potter Stewart, Associate Justice (Retired) of the Supreme Court of the United States, is sitting by designation.

Optical Corp., 641 F.2d 1128, 1132-1133 (5th Cir. 1981). The defendants and third-party defendants are or once were manufacturers of asbestos insulation products.

Asbestos products generally have wrought widespread and monstrous suffering. It is reported that insurers of asbestos manufacturers now face roughly 16,000 damage suits and that new cases are filed at the rate of 450 per month. During the past forty years, some nine million American workers still alive today were exposed to asbestos, and a study to be published by the Labor Department estimates that at least 8,500 workers -- perhaps as many as 10,000 -- will die each year until the end of this century from asbestos-related cancers. Wall St.J., June 14, 1982, at 1, col. 6 (Midwest Ed.).

The district court consolidated the ten cases for pretrial purposes. The defendants and third-party defendants moved for summary judgment in nine of the actions based on Wisconsin's three-year statute of limitations

for personal injury and wrongful death, Wis. Stat. §§ 893.14, 893.205(1), and 893.205(2) (1977). The district court denied the motions, but certified that its denial "involves a controlling issue of law as to which there is a substantial ground for difference of opinion, and an immediate appeal therefrom may materially advance the ultimate termination of the litigation." Order of April 6, 1981 at 9. We then permitted these interlocutory appeals pursuant to 28 U.S.C. § 1292(b).

I

There is no dispute that Wisconsin law governs these causes of action and that Sections 893.14, 893.205(1), and 893.205(2) of the 1977 Wisconsin Statutes comprise the applicable statutes of limitations.[1] Those

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[1] Effective July 1, 1980, Sections 893.14, 893.205(1), and 893.205(2) of the 1977 Wisconsin Statutes were repealed and replaced by new Sections 893.04 and 893.54. 1979 Wis. Laws, ch. 323, § 28. Except for an amendment concerning medical malpractice actions (new § 893.55), the new statutes are

sections provide:

> 893.14 Actions, time for commencing.
>
> The following actions must be commenced within the periods respectively hereinafter prescribed after the cause of action has accrued * * *.
>
> 893.205 Within 3 years.
>
> Within 3 years:
>
> (1) An action to recover damages for injuries to the person* * *.
>
> (2) An action brought to recover damages for death caused by the wrongful act, neglect or default of another* * *.

The dispute underlying the motions for summary judgment concerns when a cause of action for asbestos-caused injuries "has accrued" within the meaning of these statutes and thus when the three-year period has begun running.

Wisconsin law is well established up to a point. "A cause of action accrues when

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essentially the same as those quoted in the text. Personal injury and wrongful death actions must be commenced "within 3 years" (new § 893.54) "from the time that the cause of action accrues" (new § 893.04).

there exists a claim capable of present enforcement, a suable party against whom it may be enforced, and a party who has a present right to enforce it." Barry v. Minahan, 127 Wis. 570, 573, 107 N.W. 488 (1906). In order to have "a claim [in tort] capable of present enforcement," the Wisconsin Supreme Court has held the plaintiff must have suffered "an injury," or "damages." See, e.g., United States Fire Ins. Co. v. E. D. Wesley Co., 105 Wis.2d 305, 316, 313 N.W.2d 833 (1982); Holifield v. Setco Industries, Inc., 42 Wis.2d 750, 755, 168 N.W.2d 177 (1969). The problem in the instant cases is to fix a time during the course of the plaintiffs' progressive development of asbestos-caused disease when the plaintiffs were "injured" and the limitations period began running.

There are roughly three different times during the course of an asbestos disease when a plaintiff might be deemed to have received the injury that starts the limitations period:

when (or while) the plaintiff is exposed to asbestos, when the plaintiff's disease is first medically diagnosable, or when the plaintiff's disease has manifested itself by symptoms such as shortness of breath that should or in fact do alert the plaintiff to the presence of a disease. Although no Wisconsin case is directly in point, the cases tend to support the second of these times, so that a cause of action accrues when the disease becomes diagnosable. Because of the importance of the question, we would have preferred to certify it to the Wisconsin Supreme Court, but no such procedure exists.

II

The district court held that the relevant injury occurs simultaneously with exposure and, presumably because continued exposure entails continued injury, that the statute of limitations begins to run at the date of the plaintiff's last exposure to asbestos. Order of January 9, 1981 at 7. Third-party defendant

Owens-Illinois, which is the only party on appeal to support the district court's theory, gives two reasons for deeming injury to occur with exposure: (1)"the mere presence of asbestos fibers constitutes an insult to the body" and (2) damage to the lungs often begins "shortly after the initial inhalation of asbestos fibers." Brief at 7.

There is some support in the Wisconsin cases for holding that a cause of action accrues when the body is invaded by a foreign substance. E.g., Peterson v. Roloff, 57 Wis.2d 1, 203 N.W.2d 699 (1973) (remnant of gallbladder and gauze left in abdomen); McCluskey v. Thranow, 31 Wis.2d 245, 142 N.W.2d 787 (1966) (eight-inch metal hemostat left in abdomen). In those cases, the Wisconsin Supreme Court has held that the injury occurred at the time the foreign object was placed in the body, rather than when the plaintiff began suffering from the implantation, Peterson v. Roloff, 57 Wis.2d at 3-7, 203 N.W.2d 699, or eventually dis-

covered the presence of the foreign object. McCluskey v. Thranow, 31 Wis.2d at 248-249, 142 N.W.2d 787. The Wisconsin Supreme Court has been clear, nevertheless, that "the date of the negligent act [i.e., when the foreign object invades the body] is not necessarily the benchmark for the commencement of a period of limitations. Only in the event the injury occurs on the same date can it be said the cause of action then 'accrues.'" Olson v. St. Croix Valley Memorial Hospital, Inc., 55 Wis.2d 628, 632, 201 N.W.2d 63 (1972). The Court has been even more careful in defective products cases to distinguish the dates of negligence and injury. "Even if the negligence that caused the injury occurred substantially in the past, as in products liability cases, the period of limitations commences to run from the time of injury, and not from the time of the negligent act or omission * * *." United States Fire Ins. Co. v. E. D. Wesley Co., 105 Wis.2d 305, 311, 313 N.E.2d 833 (1982)

(quoting Rosenthal v. Kurtz, 62 Wis.2d 1, 6, 213 N.W.2d 741 (1974).

[1] Thus the "injury" that starts the clock running is not the defendants' allegedly wrongful act of exposing the plaintiffs to asbestos, but instead the onset of harm to each plaintiff sufficient that "he can come into court, plead and prove certain facts and secure the relief requested." Holifield v. Setco Industries, Inc., 42 Wis.2d 750, 754, 755-756, 758-759, 168 N.W.2d 177 (1969). In the medical malpractice cases so far to come before the Wisconsin Supreme Court, the malpractice and the harm have been coincidental. In each case, the injury has been sufficiently established at the time of the malpractice that a plaintiff could bring suit immediately without his damages being too speculative to permit recovery. For example, even if a hemostat were causing no present discomfort, the plaintiff could sue immediately for removal of it from his abdomen.

On the contrary, as we understand the

matter, not all persons who are exposed to asbestos contract asbestosis or the other asbestos-related diseases, and at the outset it often is impossible to diagnose which of the persons exposed to asbestos will eventually contract a disease. As the district court found, "the reaction of persons exposed to asbestos dust is highly individual and * * * not all persons exposed contract a disabling injury." 504 F.Supp. 1210, 1212; see also Eagle-Picher Industries, Inc. v. Liberty Mutual Ins. Co., 682 F.2d 12 (1st Cir. 1982). Thus even persons who will eventually become ill may be unable to come into court immediately after exposure to asbestos, because at that time their illness is only a possibility.

Among the cases cited by Owens-Illinois, Olson v. St. Croix Valley Memorial Hospital, Inc., 55 Wis.2d 628, 201 N.W.2d 63 (1972), comes closest to holding that a cause of action may accrue even though whether there will be harm remains speculative. In Olson,

the plaintiff was given a transfusion of the wrong type of blood in 1962, which allegedly affected her ability to bear children. In 1966, she gave birth to a child that lived for only seven hours, and in 1969, she delivered a stillborn child. The plaintiff did not bring her action based on the negligent transfusion until 1970. The Wisconsin Supreme Court held that the action was barred by the three-year statute of limitations, the majority finding that the injury occurred at the time of the transfusion and a two-Justice concurrence finding that the injury occurred when the first child died.

The transfusion of bad blood in Olson is similar to the inhalation of asbestos fibers in these cases because in each case the plaintiff's worst damages were realized subsequent to the foreign substance entering the body. But the transfusion in Olson did not initiate a progressive illness. If an injury occurred at all (the Wisconsin Supreme Court expressed some doubt since the plain-

tiff bore a third and healthy child in 1967, 55 Wis.2d at 634), it must have happened at the time the plaintiff received the faulty transfusion. The alleged injury occurred to the plaintiff's capacity to bear children, which, according to her complaint, was impaired at the time of the transfusion. Assuming that her inability to bear children was immediately diagnosable, the Olson plaintiff could have brought suit for her injury at any time within three years of the transfusion. In the instant case, the asbestos-caused injury ordinarily is not even diagnosable, let alone provable in court, until some undetermined time after the plaintiff's initial exposure to asbestos.

As noted above, a cause of action cannot accrue until "there exists a claim capable of present enforcement." Barry v. Minahan, 127 Wis. at 573, 107 N.W. 488. It would be most unfair to hold that the period of limitations had begun running before the plaintiff can possibly prove a cause of action, although

as the Olson case demonstrates, the plaintiff's awareness of the injury is another matter. Moreover, the Wisconsin Constitution may prevent our construing the statute of limitations to cut off the plaintiff's right to sue for damages prior to a time when the plaintiff could prove the existence of an injury. See Wis. Const. art. 1, § 9 ("Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character * * * "); Kallas Millwork Corp. v. Square D Co., 66 Wis.2d 382, 393, 225 N.W.2d 454 (1975); Rosenthal v. Kurtz, 62 Wis.2d 1, 8, 213 N.W.2d 741 (1974). Accordingly, in cases where no ascertainable damages occurred until sometime after the wrongful act of the defendant -- primarily defective product cases -- the Wisconsin Supreme Court has held that the period of limitations does not begin running until there are indeed damages. See, e.g., Wisconsin Natural Gas Co. v. Ford, Bacon & Davis Constr. Corp., 96 Wis.2d 314, 291

N.W.2d 825 (1980) (cause of action for negligent installation of pipeline accrues when cathodic protection begins shorting); Abramowski v. Wm. Kilps Sons Realty, Inc., Inc., 80 Wis.2d 468, 259 N.W.2d 306 (1977) (action for negligent home construction accrues when basement walls and foundation crack and cave in); Hartford Fire Ins. Co. v. Osborn Plumbing & Heating, Inc., 66 Wis.2d 454, 225 N.W.2d 628 (1975) (action for negligent installation of heater accrues at time of fire); Holifield v. Setco Industries, Inc., 42 Wis.2d 750, 168 N.W.2d 177 (1969) (action for wrongful death accrues when defective grinding wheel explodes). Therefore we hold that the limitations period does not necessarily begin at the time of plaintiff's exposure to asbestos and that the apparent premise of the district court's decision -- that injury and exposure are

simultaneous -- is incorrect.[2]

III

The plaintiffs contend that merely suffering diagnosable damages is insufficient to commence the period of limitations. They

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[2] Absent Wisconsin judicial precedent, the district court's decision that a cause of action accrues upon the plaintiff's last exposure to asbestos could be justified because the time of last exposure can be determined more certainly than any of the other suggestions and because that determination would require no expert medical witnesses. Cf. Insurance Co. of North America v. Forty-Eight Insulations, Inc., 633 F.2d 1212, 1230-1231 (6th Cir. 1980) (dissent's suggestion that asbestosis be deemed to occur ten years from date of first exposure), certiorari denied, ___ U.S. ___, 102 S.Ct. 686, 70 L.Ed.2d 650. Such line-drawing, however, is best left to either the Wisconsin legislature or the Wisconsin Supreme Court. See Peterson v. Roloff, 57 Wis.2d 1, 7, 203 N.W.2d 699 (1973) ("Because of the numerous cases in which the present three-year requirement for commencing an action by a party who is the victim of medical malpractice is too short, we strongly recommend to the legislature that the basic three-year statute for negligence actions due to medical malpractice be amended"); Wis. Stat. § 893.55 (effective July 1, 1980) (ameliorating the statute of limitations in medical malpractice cases).

argue that the period of limitations should not begin running until they know that they have been injured or, alternatively, until the injury in some noticeable way impairs their health so that they should know that they have been injured. The plaintiffs apparently argued on behalf of an even stronger version of the "discovery rule" before the district court, viz., that the cause of action does not accrue until "a plaintiff knew or should have known that he had a compensable injury contracted as a result of exposure to asbestos dust." Order of January 9, 1981 at 2.

The defendants and third-party defendants except Owens-Illinois argue for what in most cases would be an earlier date, when the damages are "demonstrable" or "reasonably capable of medical diagnosis." Although we do not make specific findings on the matter, in most of the consolidated cases below plaintiffs apparently had a diagnosable (often diagnosed) injury to their lungs many

years before the illness significantly impaired their health and probably before the plaintiffs either knew the cause of their injury or that it would be compensable.

[2] The Wisconsin Supreme Court has not decided a personal injury case involving an asbestos-caused or progressively disabling disease, but its other decisions indicate clearly that the plaintiff's actual knowledge that an injury has occurred or knowledge of the cause of the injury is irrelevant to when a cause of action has accrued. See e.g., Wisconsin Natural Gas Co. v. Ford, Bacon & Davis Constr. Corp., 96 Wis.2d 314, 324, 291 N.W.2d 825 (1980) ("The injury need not * * * be of such magnitude as to identify the causal factor"); Peterson v. Roloff, 57 Wis.2d 1, 203 N.W.2d 699 (1973); Olson v. St. Croix Valley Memorial Hospital, Inc., 55 Wis.2d 628, 201 N.W.2d 63 (1972). Similarly, whether a plaintiff knows that an injury is compensable under some legal theory has not been a factor in deciding when the cause of

action accrues. Cf. Boehm v. Wheeler, 65 Wis.2d 668, 679-680, 223 N.W.2d 536 (1974) (plaintiff's ignorance of legal malpractice does not toll statute of limitations). The Wisconsin Supreme Court has hinted that its prior cases preclude it from adopting a discovery rule "in [medical] malpractice cases only," Rosenthal v. Kurtz, 62 Wis.2d 1, 13, 213 N.W.2d 741 (1974); however, the Court's practice has been to defer any such extension of the limitations period to the Wisconsin legislature. E.g., Rod v. Farrell, 96 Wis.2d 349, 354-355, 291 N.W.2d 568 (1980); Peterson v. Roloff, 57 Wis.2d 1, 7, 203 N.W.2d 699 (1973). At about the same time that it adopted a discovery rule for medical malpractice cases, the Wisconsin legislature considered and rejected a discovery rule to apply in all types of personal injury actions. 1979 Assembly Bill 327 (introduced March 21,

1979; defeated Nov. 11, 1979)[3] We doubt that the Wisconsin Supreme Court would now contradict the legislature's apparent resolution of the question. See Boehm v. Wheeler, 65 Wis.2d 668, 680, 223 N.W.2d 536 (1974) (considering legislature's failure in 1973 to enact discovery rule statutes as a reason not to adopt a judge-made discovery rule).[4]

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[3] The defeated bill would have provided, in pertinent part: "an action to recover injuries to the person shall be commenced within 3 years after the person injured discovers the injury or reasonably should have discovered the injury whichever first occurs, or be barred."

[4] The plaintiffs cite cases from other jurisdictions, in particular Karjala v. Johns-Manville Prods. Corp., 523 F.2d 155 (8th Cir. 1975) (construing Minnesota law), in order to suggest that a discovery rule is better law. However, the result we have reached is strongly entailed by the Wisconsin precedents and therefore we do not need to consider the balance struck by other states between the policies "of discouraging stale and fraudulent claims, and * * * of allowing meritorious claimants, who have been as diligent as possible, an opportunity to seek redress for injuries sustained." Peterson v. Roloff, 57 Wis.2d at 6, 203 N.W.2d 699. Nor is a discovery rule mandated apparently by various provisions of

[3] The harder question is what quantum of damages must be sustained for the cause of action to accrue. Specifically, we must decide whether the cause of action accrues only when the disease has progressed to the stage that it actually impairs the plaintiff's well-being or otherwise is noticeable to the plaintiff, or instead when the plaintiff could first prove that he has the disease through medical diagnosis. As noted above, the plaintiffs argue for a time when the plaintiff suffers some noticeable impairment, while the defendants (except Owens-Illinois) argue for when the disease is first diagnosable. In the medical malpractice cases decided prior to enactment of the new discovery rule statute, the Wisconsin Supreme Court stated that the limitations period begins when the injury

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the federal Constitution. See Steinhardt v. Johns-Manville Corp., 54 N.Y.2d 1008, 446 N.Y.S.2d 244, 430 N.E.2d 1297 (Ct. App. 1981), certiorari denied, ___ U.S. ___, 102 S.Ct. 2226, 73 L.Ed. 2d ___.

was diagnosable without regard for any noticeable impairment to the plaintiff. We believe that the Wisconsin Supreme Court would apply that standard here also.

For example, in Olson, supra, the plaintiff was deemed to have suffered an injury at the time she received the faulty transfusion since it was then that her ability to bear children allegedly was affected. Although the plaintiff was not noticeably impaired until she lost her first child (and she did not in fact notice the impairment until she lost a second child), the Court's opinion implied that if she could prove her cause of action at all, it was provable at the time of the transfusion. The losses of the plaintiff's children were "consequential injuries * * * [which] had no effect on a cause of action already accrued." 55 Wis.2d at 634, 201 N.W.2d 63. Similarly, in McCluskey, supra, the plaintiff suffered no impairment from the hemostat lodged in his abdomen and did not learn of its presence

until x-rayed in the course of an unrelated examination. Nevertheless, the Court held that the cause of action accrued at the time the hemostat was left in the plaintiff's abdomen. 31 Wis.2d at 250-251, 142 N.W.2d 787.

The plaintiffs' strongest argument that there is no injury until they are noticeably impaired comes from a recent property damage decision authored by Justice Coffey now Circuit Judge Coffey of this Court, Wisconsin Natural Gas Co. v. Ford, Bacon & Davis Constr. Corp., 96 Wis.2d 314, 291 N.W.2d 825 (1980). That case involved a suit by the Wisconsin Natural Gas Company to recover damages caused by the negligent installation of a 14-mile natural gas pipeline. The Gas Company alleged that the contractor was negligent in failing to provide adequate support for the underground pipeline in light of anticipated shifting soil conditions, and that the engineering inspector failed properly to supervise the installation. The damage to the pipeline due

to the faulty installation occurred gradually and was evidenced by the increasing occurrence of "casing shorts" which knocked out portions of the pipeline's electrical anti-corrosion mechanism. The plaintiffs in the instant cases point out that the Wisconsin Supreme Court did not hold that the Gas Company's cause of action accrued at the time that the first casing short occurred, which would have barred the action under the applicable statute of limitations. Rather, the Court found "that the discovery of a single casing short, in a relatively new pipeline, is not 'sufficiently significant' to alert the Gas Company to the possibility of major defects throughout the entire 14 mile pipeline." 96 Wis.2d at 325, 291 N.W.2d 825 (quoting Tallmadge v. Skyline Construction, Inc., 86 Wis.2d 356, 359, 272 N.W.2d 404 (Ct. App. 1978). Based on that language, the plaintiffs here contend that their causes of action accrued only "when the evidence of injury * * *[became] sufficiently significant to alert the injured party to the possibility"

of an asbestos-created disease. 96 Wis.2d at 324, 291 N.W.2d 825 (quoting Tallmadge, 86 Wis.2d at 359, 272 N.W.2d 404).

[4] In any event, it is irrelevant whether the evidence of injury leads the plaintiff to realize that the disease was caused by exposure to asbestos. The portion of the Tallmadge opinion quoted by the Wisconsin Supreme Court continues: "The injury need not, however, be of such magnitude as to identify the causal factor." Id. But a test that looks for evidence of an injury "sufficiently significant to alert" plaintiffs might be appropriate in the instant cases provided the plaintiffs here were as diligent in searching for disease as the Gas Company had been in searching for damage to its pipeline. Justice Coffey began his opinion with a detailed statement of the Gas Company's efforts to protect its pipeline and detect malfunctions:

> Construction of the pipeline was commenced in January, 1968 and became

operational in September of the same year. Two months thereafter, in November, shortly after the pipeline was operational, the Gas Company conducted a survey to test for possible corrosion. Following this survey, in early 1969 (March or April), the utility retained the Harco Corporation (Harco), a corrosion engineering firm specializing in cathodic protection, to conduct a more extensive corrosion survey and to assist in developing a system of cathodic protection on the pipeline. In May of 1969 Harco located one casing short at a street crossing but concluded that the pipeline could be cathodically protected from corrosion "with little difficulty." Harco then designed and installed a system of cathodic protection to prevent further corrosion to the pipeline. In January, 1970, after the cathodic protection process was in operation, Harco recommended a yearly survey of the system. The Gas Company, following Harco's recommendation, conducted a second survey in early 1971, and after finding a number of casing shorts, determined that the pipeline could no longer be considered under cathodic protection. As a result of their findings in the 1971 survey, the Gas Company hired a second engineering and consulting firm, the Hinchman Company (Hinchman), to conduct a comprehensive survey of the entire 14 mile pipeline installed less than three (3) years earlier. Hinchman discovered six (6) "shorts * * and recommended that the utility clear and repair the underground casing shorts thus necessitating extensive excavation.

> Hinchman recommended that the utility excavate and repair as opposed to increasing the electrical current of the cathodic protection process because the current was already operating at its maximum level.
>
> As a result of Hinchman's report and recommendation, the Gas Company embarked upon an extensive program of repair and maintenance of the pipeline to clear the "shorts."

96 Wis.2d at 318-319, 291 N.W.2d 825 (footnotes omitted). Since all the evidence of damage was uncovered by or quickly turned over to the expert pipeline-injury detectors hired by the Gas Company, Justice Coffey's standard of what is sufficient to alert the Gas Company to the existence of an injury is essentially the same as what reasonably was diagnosable as an injury.

Justice Coffey went on to find that casing shorts were "'quite a usual phenomena' in the industry" and are often caused by factors other than the improper installation of the pipeline. 96 Wis.2d at 325, 291 N.W.2d 825. Moreover, to distinguish between a random short and one that portended a serious

defect, the Gas Company would be required to dig up the whole length of the pipeline. But Justice Coffey held "[i]t is unreasonable for the defendants to expect or this court to require the plaintiff, the Gas Company, to excavate the entire 14 miles of pipeline less than one year old in May of 1969 at a cost in excess of $400,000 based on their discovery of one single casing short." Id. Therefore, "the Gas Company did not actually suffer an injury until a number of 'casing shorts' rendered the cathodic protection process ineffective and necessitated an extensive excavation and repair program to clear the pipeline of the shorts." Id.

Analogously, if the plaintiffs here had hired experts in the field of lung care and the experts found symptoms that with the benefits of hindsight might have indicated the presence of a disease but were dismissed at the time as insignificant, the plaintiffs would have a strong argument that no provable cause of action had yet accrued. Moreover,

the Wisconsin Natural Gas case indicates that a cause of action will not have accrued if a plaintiff failed to undergo expensive or risky medical processes that might have detected the disease but were unreasonable under the circumstances. The appropriate standard for when a cause of action accrues, however, depends on what reasonably should "alert" the plaintiff only if he has been assiduously attentive to his health. We thus regard Wisconsin Natural Gas to be an exceptional application of the more general rule that the cause of action accrues when the asbestos-caused disease becomes diagnosable -- e.g., provable by medical evidence in court -- a standard that ordinarily is independent of what occurrences might attract the plaintiff's attention.

IV

The rule that we believe would be adopted by the Wisconsin courts is quite harsh. As noted above, it appears that most of the

plaintiffs had a diagnosable disease more than three years before they brought suit against the various defendants. We can only hope that the Wisconsin or federal legislatures will enact some measure to compensate these plaintiffs and others like them who are victims of a product that the consuming public for many years wanted manufactured. The consuming public paid a portion of the cost of manufacturing asbestos insulation in the form of its purchase price. The rest of the cost has been paid by the plaintiffs with their health.

We remand to the district court for further proceedings consistent with this opinion.

APPENDIX B

OPINION OF THE DISTRICT COURT

Charlotte E. NEUBAUER, personally and as personal representative of the Estate of Clifford S. Neubauer et al., Joy Skofronick, personally and as personal representative of the Estate of Clifford E. Mason, Walter J. Presechnik, Clarence O. Reimer and Mary M. Reimer, Darwin Frank Witkowski, Sr., and Eleanore Witkowski, Clarence P. Lillge and Hertha E. Lillge, Erich E. Eckoldt and Mamie Eckoldt, Robert J. Gaynor and Lavellette Gaynor,

Plaintiffs,

v.

OWENS-CORNING FIBERGLAS CORPORATION, a foreign corporation, et al.,

Defendants.

William GLOBIG and Kathrine A. Globig, Robert A. Wetzel and Grace M. Wetzel,

Plaintiffs,

v.

JOHNS-MANVILLE SALES COMPANY, et al.,

Defendants.

Civ. A. Nos. 77-C-52, 77-C-446, 77-C-491, 77-C-492, 78-C-43, 78-C-44, 78-C-131, 78-C-544, 79-C-117 and 79-C-980.

United States District Court, E. D. Wisconsin.

Decided January 9, 1981.

DECISION AND ORDER

REYNOLDS, Chief Judge.

These actions are product liability suits brought for the recovery of damages for injuries allegedly sustained by the plaintiffs or their decedents as a result of the inhalation of asbestos dust. In the eight cases in which the male plaintiffs contracted asbestosis (C.A. Nos. 77-C-491, 77-C-492, 78-C-43, 78-C-44, 78-C-131, 78-C-544, 79-C-117, and 79-C-980), motions to dismiss and for summary judgment have been brought on behalf of all defendants and third-party defendants. In the two cases in which the decedents of the plaintiffs contracted mesothelioma (C.A. Nos. 77-C-52 and 77-C-446) motions to dismiss and for summary judgment have been brought only as to the claims for damages for medical costs and for pain and suffering but not as to the wrongful death claims.

The issue posed by the pending motions is the proper interpretation of the applicable

state statute of limitations, formerly § 893.205(1), Wis. Stats., which provided that within three years of its accrual, "[a]n action to recover damages for injuries to the person"* must be brought. Former § 893.14, Wis. Stats. (revised and renumbered as § 893.04, Wis. Stats., by the laws of 1979, effective July 1, 1980), which was in effect at the time these actions were commenced, provided:

---

* By the laws of 1979, c. 323, § 28, eff. July 1, 1980, former § 893.205(1), as revised, was renumbered § 893.54, Wis. Stats. (1979). By the same act a separate statute of limitations for medical malpractice actions, § 893.55, Wis. Stats. (1979), was created. Present § 893.54 provides, as did former § 893.205(1), for a three-year statute of limitations for an action to recover damages for injuries to the person. Present § 893.55 provides that a medical malpractice action must be brought within three years of the date of injury, or one year from the date the injury was or should have been discovered but in no event more than five years from the date of injury, or where a foreign object is left in the body within one year from the date the injury was or should have been discovered.

> "The following actions must be commenced within the periods respectively herinafter prescribed after the cause of action has accrued * * *."

The plaintiffs argue for an interpretation of § 893.205(1) which permits suit to be filed within three years after a plaintiff knew or should have known that he had a compensable injury contracted as a result of exposure to asbestos dust. The defendants and third-party defendants argue variously for a date of injury without regard to whether a plaintiff at the time of injury knew or had reason to know its cause or for a date of last exposure to asbestos-containing products manufactured by a particular defendant or third-party defendant.

The male plaintiffs and the decedents of the female plaintiffs in the Neubauer and Skofronick cases worked for many years with insulation products. The defendants and third-party defendants are all manufacturers of insulation products and at various times made their products with asbestos content. It is

alleged that the plaintiffs and two decedents were exposed during their working years to asbestos-containing insulation products manufactured by some or all of the defendants and third-party defendants and as a result suffered compensable injuries.

The parties agree that asbestosis and mesothelioma are progressive diseases caused by the prolonged exposure to asbestos dust. There appears to be no dispute that the plaintiffs and two decedents contracted one or the other of the two diseases as a result of exposure to asbestos dust. There also appears to be no dispute that a tendency toward pneumonia, shortness of breath, wheezing, pleural calcification, and pulmonary dysfunction may be symptomatic of asbestos-caused disease. Uncontradicted affidavits on file prepared by Dr. John Schluetter, an expert retained by the defendant Johns-Manville Sales Company, establish that asbestos-caused diseases tend to develop over time and, once contracted, may become progressively worse even after

exposure to asbestos dust ceases because of the internal reaction to asbestos fibers lodged in the lungs. An uncontradicted affidavit on file prepared by Dr. Nathan Grossman, an expert retained by the plaintiffs, establishes that the reaction of persons exposed to asbestos dust is highly individual and that not all persons exposed contract a disabling injury. The parties do not agree on what symptoms each plaintiff exhibited at what time nor on the extent of disability suffered by each plaintiff nor on the time when each plaintiff may be said to have suffered a compensable injury. Conflicting affidavits have also been filed regarding each plaintiff's knowledge of his medical condition three years and one day before filing suit.

Because there are no Wisconsin court cases applying § 893.205(1), Wis. Stats., to a plaintiff with a progressive industrial disease, the plaintiffs have pointed out to the court cases of a similar nature which

have arisen in other jurisdictions. Thus, in Karjala v. Johns-Manville Products Corporation, 523 F.2d 155 (8th Cir. 1975), an asbestosis case, the Court held that the applicable statute of limitations did not begin to run until damage sufficient to maintain a cause of action had occurred, the plaintiff's harm had become manifest, and he had reason to know the cause of his harm. See also Borel v. Fibreboard Paper Products Corporation, 493 F.2d 1076, 1102 (5th Cir. 1973), and Insurance Company of North America v. Forty-Eight Insulations, Inc., 451 F.Supp. 1230 (E.D. Mich. 1978), both applying a discovery rule. The third-party defendant Owens-Illinois, Inc., on the other hand, points to several cases which hold that the statute of limitations commences to run on the date of plaintiff's last exposure to the disease-causing substance, that being the date on which the defendant's wrongful conduct ceases. See, e.g., Rowe v. Gatke Corporation, 126 F.2d 61 (7th Cir. 1942) (applying Indiana law

in an asbestosis case and therefore holding that the statute of limitations runs two years "after the last day of the last exposure to the hazards of the disease"); Armour & Company, Inc. v. Mitchell, 262 F.2d 580 (6th Cir. 1958); Simmons v. Mutual Liability Insurance Co., 433 F.Supp. 747 (S.D. Ala. 1976). However, "'Decisions of the courts of other states involving their statutes [of limitations] and prior decisions are of little value in cases arising in Wisconsin under Wisconsin law.'" Koschnik v. Smejkal, 96 Wis.2d 145, 153 n. 6, 291 N.W.2d 574 (1980), citing Reistad v. Manz, 11 Wis.2d 155, 158, 105 N.W.2d 324 (1960). Therefore, it is to the Wisconsin cases interpreting § 893.205(1), Wis. Stats., and the state statutes of limitations in general that this Court must look for guidance in these cases.

For the most part cases which have arisen under § 893.205(1), Wis. Stats., have been medical malpractice cases, and the Wisconsin Supreme Court has uniformly held that in those

cases the statute of limitations begins to run on the date of injury which normally corresponds to the date of the negligent act without regard to the date on which the plaintiff discovered his injury and its cause. See, e.g., Rod v. Farrell, 96 Wis.2d 349, 291 N.W.2d 568 (1980) (holding that in the case of a man who had a congenital hernia repaired in 1955 and did not discover until 1975 when he had exploratory surgery to discover the cause of his wife's failure to become pregnant that during the hernia surgery a portion of his vasa had been removed and he was sterile, the three-year statute of limitations began to run from the date of the hernia surgery); Olson v. St. Croix Valley Memorial Hospital, Inc., 55 Wis.2d 628, 201 N.W.2d 63 (1972) (holding that plaintiff's cause of action accrued in 1962 when she was given a transfusion of the wrong type of blood which allegedly resulted in the birth of a stillborn child in 1969); McCluskey v. Thranow, 31 Wis.2d 245, 142 N.W.2d 787 (1966) (holding

that plaintiff's cause of action accrued in 1956 when a hemostat was left in her abdomen during surgery and not in 1962 when the presence of the hemostat was discovered during routine x-rays). In a product liability action under § 893.205(1), the cause of action is also held to accrue at the time of injury as opposed to the time of the negligent act (the sale of the defective product) or the time of discovery. Holifield v. Setco Industries, Inc., 42 Wis.2d 750, 168 N.W.2d 177 (1969); Denzer v. Rouse, 48 Wis.2d 528, 532, 180 N.W.2d 521 (1970). In most product liability cases the fact of damage will be readily apparent at the time of injury. Holifield v. Setco Industries, Inc., supra. In the medical malpractice area, in contrast, damage is not always apparent at the time of injury. The Court has recognized the inequity of its holding that the statute of limitations may begin to run before the plaintiff has an opportunity to learn of his injury, and seemingly before any compensable damage has

occurred, Olson v. St. Croix Valley Memorial Hospital, Inc., supra, at 635, 201 N.W.2d 63 (concurrence of Justice Hallows), but has held consistently that correction of the inequity must await legislative action. Peterson v. Roloff, 57 Wis.2d 1, 6-7, 203 N.W.2d 699 (1973); Koschnik v. Smejkal, 96 Wis.2d 145, 153-154, 291 N.W.2d 574 (1980).

Outside of the medical malpractice context, the Court also looks to the date of injury and not to the date of the negligent act or the date of discovery. Peterson v. Roloff, supra, at 6, 203 N.W.2d 699. Indeed, the Court has noted that in certain instances, e.g., § 893.19(7) (fraud) and § 102.12 (worker's compensation), the legislature has provided expressly for tolling of a statute of limitations until discovery, and the Court applies the rule of "expressio unius est exclusio alterius" to conclude that, therefore, in other instances the running of the statute of limitations does not await discovery. Peppas v. Marshall & Ilsley Bank, 2 Wis.2d 144, 148-149,

86 N.W.2d 27 (1957). Thus, in Milwaukee County v. Schmidt, Garden & Erikson, 43 Wis.2d 445, 168 N.W.2d 559 (1969), an architectural malpractice and breach of contract action brought pursuant to § 893.19(5), Wis. Stats., it was held that the statute of limitations began to run at the time of the breach even though the plaintiff did not then know or have reason to know of the breach. In Peppas v. Marshall & Ilsley Bank, supra, the Court held that the statute of limitations governing recovery of money paid out under a forged endorsement began to run from the time the sum was deducted from plaintiff's account and not from the time he learned of the forgery. In Denzer v. Rouse, 48 Wis.2d 528, 533, 180 N.W.2d 521 (1970), a legal malpractice action, the statute of limitations began to run on plaintiff's claim against his attorney at the time he bought a parcel of property containing a misdescription in the deed and not at the time he attempted to sell the parcel:

> "* * * Since '...a person has a "cause of action" when he can come into court, plead and prove certain facts and secure the relief requested,' his cause of action was then complete, except that he did not know that it then existed. The only missing ingredient was actual knowledge that a mistake in describing the property had been made. The date of gaining such knowledge is the date of discovery. As this court has said, '... That the injury did not become noticeable or was not in fact noticed until a later date is another question....' Tolling of the statute of limitations in this state does not await the time or fact of discovery. When negligence and resultant injury have occurred, the statute starts to run. * * *"

Similarly, in Milwaukee County v. Schmidt Garden & Erikson, supra, at 455, 168 N.W.2d 559, quoting from Ott v. Hood, 152 Wis. 97, 100, 139 N.W. 762 (1913), the Court stated:

> "'"A cause of action on contract, whether for damages or otherwise, commences to run from the time of the breach, whether the facts are known to the party having the right or not, and if the latter, whether through ignorance, neglect, or mistake of such party or fraud of his adversary. There is no exception (citing cases).
>
> "'"The inexorable nature of our statutes of limitations is most emphatically illustrated by Pietsch

> v. Milbrath, 123 Wis. 647, 101 N.W. 388, 102 N.W. 342, and, in effect, by all the other cited cases, by use therein of this language from Bank of Hartford County v. Waterman, 26 Conn. 324, 330: 'Ignorance of his rights on the part of a person against whom the statute has begun to run will not suspend its operation. He may discover his injury too late to take advantage of the appropriate remedy. Such is one of the occasional hardships necessarily incident to a law arbitrarily making legal remedies contingent on mere lapse of time.'"' (Emphasis added.)"

[1, 2] Applying the general rules set forth above on interpretation of Wisconsin statutes of limitations, it is my opinion that the Wisconsin Supreme Court would hold that the date of injury for a plaintiff who contracts a progressive disease as a result of protracted exposure to a disease-causing substance is the date of his last exposure to the disease-causing substance. Since asbestosis and mesothelioma are caused by a tissue reaction to imbedded asbestos fibers, the final date of inhalation would be the final date of injury without regard to the date on which the symptoms of the disease became

manifest or the date on which the plaintiff had reason to know of his injury or its cause. As stated above, "'"* * *'Ignorance of his rights on the part of a person against whom the statute has begun to run will not suspend its operation [even though] [h]e may discover his injury too late to take advantage of the appropriate remedy. * * *'"' * * *." Milwaukee County v. Schmidt, Garden and Erikson, supra, at 455, 168 N.W.2d 559.

It is also my opinion, however, that because of the nature of the process of contracting asbestosis or mesothelioma, the date of injury is the date of last exposure to the disease-causing substance, i. e., asbestos, without regard to its particular manufacture. The third-party defendant Owens-Illinois, Inc., has moved for summary judgment on the ground that it ceased the manufacture of asbestos-containing insulation products in 1958 and that none of the plaintiffs or their decedents were exposed to products containing asbestos manufactured by it within three years

of filing suit. That argument goes to causation and not to the date of injury, and it is a question of fact to be resolved at trial whether the plaintiffs' exposure to products manufactured by Owens-Illinois, Inc., contributed to their injuries. In other words, because the types of injuries suffered by the plaintiffs in these cases result from prolonged exposure, because earlier exposure may contribute to a subsequent injury, and because, but for the earlier exposure, later exposure to asbestos-containing products might not have resulted in injury to a particular plaintiff, the Court will look to the date of a plaintiff's last exposure to any product containing asbestos to determine the date on which the statute of limitations began to run for his claims against all manufacturers of asbestos-containing products to which he was exposed during his working life. This result is mandated by the nature of the physical process of contracting asbestos-caused diseases. A plaintiff in Wisconsin

must sustain actual damage, and not merely potential damage which never ripened into actual damage, before he may recover. Widemshek v. Fale, 17 Wis.2d 337, 340-341, 117 N.W.2d 275 (1962); Central Mutual Insurance Company v. H. O., Inc., 63 Wis.2d 54, 59, 216 N.W.2d 239 (1974). It is also consistent with the Wisconsin Supreme Court's holding that a manufacturer who sells a defective product may be liable for an indefinite period of time after the sale and, specifically, until the resultant injury has occurred and the plaintiff's cause of action has accrued. Holifield v. Setco Industries, Inc., 42 Wis.2d 750, 757-758, 168 N.W.2d 177 (1969).

[3] This holding is not consistent with the Court's tentative decision announced during the oral argument held on December 12, 1980, which was that in regard to the statute of limitations, a discovery rule would be applied to these cases. Upon reconsideration of the arguments of the parties, the briefs and affidavits submitted, and the case law,

the Court has concluded that Wisconsin law does not recognize the discovery rule in applying its statutes of limitations except where provided for expressly by the legislature. Therefore, this Court, having jurisdiction solely because of diversity, is bound to apply and to follow the law of the State of Wisconsin.

The hearing previously scheduled for January 15 and 16, 1981, to discuss the applicability of the statute of limitations on a case-by-case basis is cancelled. A motion and briefing schedule is established, however, for any summary judgment motions which the parties may wish to bring based upon lack of contact by any plaintiff or her decedent with any product containing asbestos more than three years and one day before filing suit. A schedule is also established in the event any party intends to request certification of this ruling to the United States Court of Appeals for the Seventh Circuit.

For the foregoing reasons,

IT IS ORDERED that the motions for summary judgment of the defendant Johns-Manville Sales Company, of liaison counsel on behalf of all third-party defendants, of the Keene Corporation, of Armstrong Cork Co., of Owens-Corning Fiberglas Corp., and of Owens-Illinois, Inc., for summary judgment are denied.

IT IS FURTHER ORDERED that if any party intends to seek certification of this decision and order to the United States Court of Appeals for the Seventh Circuit, the motion for certification shall be served and filed within fourteen days from the filing date of this order; answering briefs shall be served and filed within twenty-one days of the filing date of this order; and any reply briefs shall be served and filed within twenty-five days of the filing date of this order.

IT IS FURTHER ORDERED that if any party intends to move for summary judgment on the ground of lack of contact with products containing asbestos by any plaintiff within three years and one day of filing suit, such motion

shall be served and filed with supporting material on or before February 16, 1981; answering briefs shall be served and filed on or before March 3, 1981; and any reply briefs shall be served and filed on or before March 9, 1981.

APPENDIX C

ORDER DENYING REHEARING

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 16, 1982

Before

Hon. Walter J. Cummings, Chief Judge
Hon. Potter Stewart, Justice (Retired)*
Hon. Jesse E. Eschbach, Circuit Judge

CHARLOTTE E. NEUBAUER, et al.,
Plaintiffs-Appellees,
Cross-Appellants,
Nos. 81-1939-81-1951
81-8021--81-8033 vs.
OWENS-CORNING FIBERGLAS CORP., et al.,
Defendants-Appellants,
Cross-Appellees,
vs.
PITTSBURGH CORNING CORP., et al.,
Third Party Defendants-
Appellants, Cross-Appellees.

Appeals from the United States
District Court for the Eastern
District of Wisconsin.

Nos. 77 C 52, 77 C 446, 77 C 491,
77 C 422, 78 C 43, 78 C 44,
78 C 131, 78 C 544, 79 C 117
and 79 C 980.

John W. Reynolds, Chief Judge.

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* The Honorable Potter Stewart, Associate Justice (Retired) of the Supreme Court of the United States, is sitting by designation.

O R D E R

On consideration of the petition for rehearing filed in the above-entitled cause by plaintiffs-appellees-cross-appellants Charlotte E. Neubauer, et al., all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX D

ORDER GRANTING PERMISSION TO APPEAL

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 3, 1981

Before

Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. Robert A. Sprecher, Circuit Judge
Hon. William J. Bauer, Circuit Judge

MISCELLANEOUS NOS: 81-8021, 81-8024, 81-8025, 81-8026, 81-8027, 81-8028, 81-8029, 81-8030, 81-8031 and 81-8032.

OWENS-CORNING FIBERGLAS, et al.,
Petitioner,

vs.

CHARLOTTE E. NEUBAUER, et al.,
JOY SKOFRONICK, etc.,
WALTER J. PRESECHNIK,
CLARENCE O. REIMER and MARY M. REIMER,
DARWIN FRANK WITKOWSKI, SR. and
ELEANORE WITKOWSKI,
CLARENCE P. LILLGE and HERTHA E. LILLGE,
ERICH E. ECKOLDT and MAMIE ECKOLDT,
ROBERT J. GAYNOR and LAVELLETTE GAYNOR
WILLIAM GLOBIG and KATHRINE A. GLOBIG,
ROBERT A. WETZEL and GRACE M. WETZEL,
Respondents.

NO. 81-8022
JIM WALTER CORPORATION, et al.,
Petitioners,

vs.

CHARLOTTE E. NEUBAUER, et al.,
Respondents.

NO. 81-8023
JOHNS-MANSVILLE SALES COMPANY,
Petitioner,

vs.

CHARLOTTE E. NEUBAUER, et al.,
Respondents.

NO. 81-8033
CHARLOTTE E. NEUBAUER, et al.,
Petitioners,

vs.

OWENS-CORNING FIBERGLAS, et al.,
Respondents.

Appeals from the United States District Court for the Eastern District of Wisconsin.

Nos. 77-C-52, 77-C-446, 77-C-491, 77-C-492, 78-C-43, 78-C-44, 78-C-131, 78-C-544, 79-C-117, 79-C-980.

Judge John W. Reynolds

This matter comes before the court for its consideration upon the following documents:

1. The "PETITION FOR PERMISSION TO APPEAL UNDER 28 U.S.C. Sec. 1292 (b)", filed herein on April 15, 1981, by counsel for the petitioner, Owens-Illinois, Inc.

2. The "THIRD PARTY DEFENDANTS' CONSOLIDATED PETITION FOR PERMISSION TO APPEAL PURSUANT TO 28 U.S.C. Sec. 1292(b) AND RULE 5, FEDERAL RULES OF APPELLATE PROCEDURE" filed herein on April 16, 1981, by counsel for third party defendants.

3. The "PETITION FOR PERMISSION TO APPEAL" filed herein on April 16, 1981, by counsel for petitioner Johns-Manville Sales Corporation.

4. The "PETITION OF OWENS-CORNING FIBERGLAS FOR PERMISSION TO APPEAL A DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN" filed herein on April 16, 1981, by counsel for the petitioner, Owens-Corning Fiberglas Corporation. Docket No. 81-8024 (77-C-446)

5. Same petition as 4. -- Docket No. 81-8025 (77-C-491)

6. Same petition as 4. -- Docket No. 81-8026 (77-C-492)

7. Same petition as 4. -- Docket No. 81-8027 (78-C-43)

8. Same petition as 4. -- Docket No. 81-8028 (78-C-44)

9. Same petition as 4. -- Docket No. 81-8029 (78-C-131)

10. Same petition as 4. -- Docket No. 81-8030 (78-C-544)

11. Same petition as 4. -- Docket No. 81-8031 (79-C-117)

12. Same petition as 4. -- Docket No. 81-8032 (79-C-980)

13. The "PETITION FOR PERMISSION TO APPEAL" filed herein on April 17, 1981, by counsel for the Plaintiffs.

On consideration thereof,

IT I ORDERED that the petitions for permission to appeal under 28 U.S.C. Sec. 1292(b) are hereby GRANTED.

IT IS FURTHER ORDERED that the Clerk of the United States District Court certify and transmit the records in these appeals to this court on or before June 15, 1981. Counsel for the petitioners are directed to pay $65.00 docketing fee for these appeals to the Clerk of the District Court on or before June 12, 1981.

IT IS ALSO FURTHER ORDERED that these appeals be consolidated for purposes of briefing and oral argument and that a docketing conference, pursuant to Federal Rule of Appellate Procedure 33 be scheduled. The parties will be notified by separate notice of the docketing conference.

No. 82-1010

Supreme Court, U.S.
FILED
JAN 17 1983
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1982

CHARLOTTE E. NEUBAUER, personally and as personal representative of the Estate of Clifford S. Neubauer, et al.,

Plaintiffs,

vs.

OWENS-CORNING FIBERGLAS CORP., et al.,

Defendants.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Does the determination by the court of appeals that a cause of action for asbestos-caused disease accrues and the Wisconsin statute of limitations begins to run at the time the disease is first medically diagnosable deprive the petitioners of property without due process of law?

LIST OF PARTIES

Petitioner's list of the parties is not accurate. They should be identified as follows:

I. Parties In The Court Of Appeals.

A. Plaintiff-Appellees-Cross-Appellants:

Charlotte E. Neubauer, personally and as personal representative of the Estate of Clifford S. Neubauer

Joy Skofronick, personally and as personal representative of the Estate of Clifford E. Mason

Walter J. Presechnik

Clarence O. Reimer and Mary M. Reimer

Darwin Frank Witkowski, Sr. and Eleanore Witkowski

Clarence P. Lillge and Hertha E. Lillge

Erich E. Eckoldt and Mamie Eckoldt

Robert J. Gaynor and Lavellette Gaynor

William Globig and Kathrine A. Globig

Robert A. Wetzel and Grace M. Wetzel

B. Defendants-Appellants-Cross-Appellees:

Johns-Manville Sales Corp.

Owens-Corning Fiberglas Corp.

C. Third-Party Defendants-Appellants-Cross-Appellees:

Pittsburgh Corning Corp.

Jim Walter Corp.

Celotex Corp.

Fibreboard Corp.

GAF Corp.

Atlas Asbestos Co.

H. K. Porter Co., Inc.

Southern Asbestos Co.

Forty-Eight Insulations, Inc.

Armstrong Cork Co.

Nicolet, Inc.

Standard Asbestos Manufacturing & Insulating Co.

Unarco Industries, Inc.

Raybestos Manhattan, Inc.

Rock Wool Manufacturing Co.

Ryder Industries, Inc.

D. Third-Party Defendant-Appellant-Cross-Appellee:

Owens-Illinois, Inc.

II. Parties In Court Of Appeals Who Are No Longer Participating In The Case:

Johns-Manville Sales Corp.

Unarco Industries, Inc.

III. Parties Listed In The Petition Who Did Not Appear In The Court Of Appeals:

Transcontinental Insurance Company

Certain-Teed Products Corp.

Turner-Newall, Ltd.

Eagle-Picher Industries, Inc.

Due to the number of corporations involved, the information required by Rule 28.1 is set forth in Appendix C to this brief.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1010

CHARLOTTE E. NEUBAUER, personally and as personal representative of the Estate of Clifford S. Neubauer, et al.,

Plaintiffs.

vs.

OWENS-CORNING FIBERGLAS CORP., et al.,

Defendants.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The petition arises out of an interlocutory judgment and opinion of the United States Court of Appeals for the Seventh Circuit which determined when the Wisconsin statute of limitations for personal injury begins running against causes of action for asbestos-caused diseases. The appeal was before Chief Judge Walter J. Cummings, Justice Potter Stewart (Retired, sitting by designation), and Circuit Judge Jesse E. Eschbach.

The statute of limitations defense was initially raised in the district court by motions for summary judgment brought by the defendants and third-party defendants. In the *Neubauer* and *Skofronick* cases, summary judgment was sought only against the claims for the decedents' medical costs and pain and suffering. Summary judgment was not sought in those cases with regard to the statutory wrongful death claims granted their personal representatives and survivors.

The district court did not make any specific findings of fact or conclusions of law in any individual case. In its decision and order of January 9, 1981, the district court determined Wisconsin law applicable in all 10 actions. Subsequent motions were to have been considered applying that law on a case by case basis. *Neubauer* v. *Owens-Corning Fiberglas Corp.*, 504 F.Supp. 1210, 1216 (E.D. Wis. 1981) (Respondents' Appendix, pp. 35a-36a). Those motions were never determined due to the district court's certification of the decision and order and the acceptance of the appeal.

The court of appeals also made no specific factual determination in any of the individual cases beyond what was necessary to reach the legal issue. It remanded to the district court for further proceedings consistent with its opinion. No further proceedings have occurred in the district court since remand.

On July 29, 1982, Unarco Industries, Inc., a third-party defendant and one of the prevailing parties in the court of appeals, filed a petition for reorganization under Chapter 11 of the Bankruptcy Code, 11 U.S.C. Sec. 101 *et seq.* in the United States Bankruptcy Court for the Northern District of Illinois, Case Nos. 82-B-9841 through 82-B-9851. Cross claims against Unarco have been asserted by various defendants and third-party defendants.

On August 26, 1982, Johns-Manville Corporation and its affiliates, including Johns-Manville Sales Corporation a defendant and prevailing party in the court of appeals, filed petitions for reorganization under Chapter 11 of the Bankruptcy Code, 11 U.S.C. Sec. 101 *et seq.* in the United States Bankruptcy Court for the Southern District of New York, Case Nos. 82-B-11656 through 82-B-11676. Cross claims have been asserted against Johns-Manville Sales Corporation by various defendants and third-party defendants.

Respondents agree with petitioners that the injured party in each of these cases had a diagnosable asbestos disease more than three years before suit was brought. (See petition page 19). In four of the cases, *Witkowski, Gaynor, Globig* and *Wetzel,* actual diagnosis also occurred more than three years before suit was commenced.

SUMMARY OF REASONS FOR DENYING THE WRIT

Prior to the accrual of a cause of action, there is no right to a remedy in state court for personal injuries which is protected by federal law. The court of appeals in these cases only decided when a cause of action accrues under Wisconsin law. Accordingly, no existing federal right was affected.

Under Wisconsin law, a cause of action for personal injuries accrues and the statute of limitations commences to run at the time of injury. In accordance with prior decisions of the Wisconsin Supreme Court, the court of appeals determined that a person claiming damages for an asbestos-caused disease is injured, commencing the running of the statute of limitations, at the time the disease is first medically diagnosable. Such does not violate Article I, Section 9 of the Wisconsin Constitution, because no right of action is extinguished before an injury is suffered.

REASONS FOR DENYING THE WRIT

I. NO SUBSTANTIAL QUESTION OF FEDERAL LAW IS PRESENTED

In these actions the district court and the court of appeals were presented only with the issue of when the statute of limitations begins to run under Wisconsin law with respect to actions for injuries to a person due to asbestos-caused diseases. Before both courts, there was no dispute that this was an issue controlled by the law of the state of Wisconsin. *Neubauer* v. *Owens-Corning Fiberglas Corp.*, 686 F.2d 570, 571 (7th Cir. 1982) (Respondents' Appendix, p. 3a); *Neubauer* v. *Owens-Corning Fiberglas Corp.*, 504 F. Supp. 1210, 1213 (E.D.Wis. 1981) (Respondents' Appendix, p. 24a).

Petitioners assert that the right to sue in a Wisconsin court for damages due to personal injury is a fundamental property right protected by the Due Process Clause. The right to sue in a state court for damages due to personal injury is a right of common law or, in the case of an action for wrongful death, a right created solely by state statute. Such a right is not fundamental, guaranteed or absolute under federal law. In *Munn* v. *Illinois*, 94 U.S. 113 (1877), this Court stated:

> A person has no property, no vested interest, in any rule of the common law. . . . Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations.

Id. at 134. The court has more recently noted that "[i]t cannot seriously be argued that a statutory entitlement

to sue for the wrongful death of another is itself a fundamental or constitutional right." *Parham* v. *Hughes*, 441 U.S. 347, 358, n. 12 (1979).

As a matter of constitutional law, statutes of limitation go to matters of remedy, not the destruction of fundamental rights. *Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304, 314 (1945). This Court further stated in *Chase Securities* at page 314 that statutes of limitation

> represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a "fundamental" right or what used to be called a "natural" right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.

See also Mattson v. *Department of Labor and Industries of Washington*, 293 U.S. 151, 155 (1934); *Atchafalaya Land Company, Limited* v. *F. B. Williams Cypress Company, Limited*, 258 U.S. 190, 197 (1922); *Gilfillian* v. *Union Canal Company of Pennsylvania*, 109 U. S. 401, 404 (1883).

The Due Process Clause does not forbid the "creation of new rights or the abolition of old ones recognized by the common law to obtain a permissible legislative object." *Silver* v. *Silver*, 280 U.S. 117, 122 (1929); *see also Louis Pizitz Dry Goods Co., Inc.* v. *Yeldell, Administrator*, 274 U.S. 112, 116 (1927); *Wilmington Star Mining Co.* v. *Fulton*, 205 U.S. 60, 74 (1907). The permissible objectives of statutes of limitations have been restated by this court on numerous occasions. *See, e.g., United States* v. *Marion*, 404 U.S. 307, 322, n. 14 (1971). They "are found and approved in all systems of enlightened jurisprudence," *Wood* v. *Carpenter*, 101 U.S. 135, 139 (1879), and have, since the

early days of the Republic, been recognized within the sovereign power of each state to enact. *Hawkins* v. *Barney's Lessee*, 5 Pet. 457 (1831).

In their brief, petitioners cite only two cases of this Court, *Wheeler* v. *Jackson*, 137 U.S. 245 (1890), and *Angle* v. *Chicago, St. P., M. & O. Co.*, 151 U.S. 1 (1893). These cases do not stand for their argument that a remedy for a cause of action is a constitutionally protected property right. In *Angle*, the Court referred only to an *existing* right of action when it stated such was property. 151 U.S. at 19-20. The Court's statement in *Wheeler* directly supports the proposition that prior to the accrual of an action there is no right protected by federal law.

> A Statute of Limitation cannot be said to impair the obligation of a contract, or to deprive one of property without due process of law, unless, in its application to an *existing* right of action, it unreasonably limits the opportunity to enforce that right by suit.

137 U.S. at 258 (emphasis added). Accordingly, in the statute of limitations context, where no existing right is deprived no substantial federal question is presented.

These cases do not involve a retroactive shortening of the statute of limitations so as to eliminate or unreasonably limit the opportunity to enforce an existing right of action. The sole question before both the district court and the court of appeals was when the period of limitations began to run. Under Wisconsin law, each petitioner then had three years to commence an action. No right to property already in existence was affected by this application of Wisconsin law.

Petitioners' true argument is that under Wisconsin law, as determined by the court of appeals, the available remedy is not as great as they would like it to be. As the pre-

vious discussion shows, however, no right protected by the United States Constitution is deprived or affected under such circumstances. Therefore, no federal question is presented.

II. THE COURT OF APPEALS CORRECTLY DECIDED THE ISSUE

Because jurisdiction in these cases below is based upon diversity of citizenship, the court of appeals was bound to decide the issue of when the actions accrued and the statute of limitations began to run in accordance with Wisconsin law and in accordance with the rule it believed would be adopted by the Wisconsin Supreme Court if it were presented with the question.

Based upon the established principles in Wisconsin law regarding statutes of limitations (1) that a cause of action accrues when there exists a claim capable of enforcement, *Barry* v. *Minihan,* 127 Wis. 570, 573, 107 N.W. 488, 490 (1906), and (2) that a claim capable of enforcement exists when the person is injured, assuming an act of negligence has occurred, *Holifield* v. *Setco Industries, Inc.,* 42 Wis.2d 750, 755, 168 N.W.2d 177, 180 (1969), the court of appeals correctly identified its task as fixing the time during the course of the progressive development of an asbestos-caused disease when the petitioners or their decedents were injured. *Neubauer,* 686 F.2d at 572 (Respondents' Appendix, p. 4a).

Under Wisconsin law the statute begins to run at the time of injury regardless of whether the plaintiff has knowledge of the injury or its cause, and regardless of whether the injury has manifested itself by causing discomfort or disability. *Rod* v. *Farrell,* 96 Wis.2d 349, 353-55, 291 N.W.2d 568, 569-71 (1980); *Olson* v. *St. Croix Valley Memorial Hospital, Inc.,* 55 Wis.2d 628, 633, 201 N.W. 2d 63, 65 (1972). It is the initial injury that triggers the

running of the period of limitations under Wisconsin law and subsequent consequential injuries have no effect upon a cause of action already accrued. *Olson*, 55 Wis.2d at 634, 201 N.W.2d at 65.

The court of appeals found that under Wisconsin case law, the period of limitations begins to run when the injury is first diagnosable without regard for any noticeable impairment to the plaintiff. *Neubauer*, 686 F.2d at 575 (Respondents' Appendix, p. 10a). Following such authority, the court of appeals held that in these cases the period began to run at the time when the claimed disease was first medically diagnosable, as proved by medical evidence. *Id.* at 577 (Respondents' Appendix, p. 14a). If a plaintiff has a medically diagnosable disease, he or she is injured.

The court of appeals considered its decision in light of Article I, Section 9 of the Wisconsin Constitution. *Id.* at 574 (Respondents' Appendix, p. 7a). By implication and consistent with Wisconsin case law, it correctly found that its holding would not violate that provision, as asserted by petitioners. In prior cases, the Wisconsin Supreme Court had found no violation of the Wisconsin Constitution since the right of action was not extinguished before the injury was suffered. *Rod* v. *Farrell*, 96 Wis.2d at 355-57, 291 N.W.2d at 571-74; *Reistad* v. *Manz*, 11 Wis.2d 155, 158-59, 105 N.W.2d 324, 325-26 (1960).

Petitioners, in arguing that the Wisconsin Constitution is violated, only camouflage in constitutional terms their complaint that the court of appeals erred in determining when one is injured. Here the statute of limitations did not bar petitioners' claims until three years after the dates of injury. The issue of date of injury is wholly dependent upon Wisconsin law, involves no federal or state constitutional interests, and was determined based upon full consideration of, and not inconsistent with, the decisions of the court of last resort of the State of Wisconsin.

CONCLUSION

Since this issue presented involves no federally protected right and was decided in accordance with Wisconsin law, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 81-8021 through 81-8033
and 81-1939 through 81-1951

CHARLOTTE E. NEUBAUER, et al.,

Plaintiffs-Appellees,
Cross-Appellants,

v.

OWENS-CORNING FIBERGLAS CORP., et al.,

Defendants-Appellants,
Cross-Appellees,

v.

PITTSBURGH CORNING CORP., et al.,

Third Party Defendants-Appellants,
Cross-Appellees.

Appeals from the United States District Court for the Eastern District of Wisconsin.
Nos. 77 C 52, 77 C 446, 77 C 491, 77 C 492, 78 C 43, 78 C 44, 78 C 131, 78 C 544, 79 C 117, and 79 C 980.
John W. Reynolds, *Chief Judge.*

ARGUED FEBRUARY 24, 1982—DECIDED AUGUST 13, 1982

Before CUMMINGS, *Chief Judge,* STEWART, *Justice (Retired),** and ESCHBACH, *Circuit Judge.*

* The Honorable Potter Stewart, Associate Justice (Retired) of the Supreme Court of the United States, is sitting by designation.

CUMMINGS, *Chief Judge*. These appeals require us to determine when the Wisconsin statute of limitations for personal injuries begins running against causes of action for asbestos-caused diseases.

The plaintiffs or decedents in each of the ten cases below were insulation workers who were exposed to insulation containing asbestos. In two of the cases the insulation workers died from mesothelioma, a cancer that allegedly is caused by exposure to asbestos fibers. In the remaining eight cases the workers suffer from asbestosis, a lung disease involving fibrosis of the lungs, pleural thickening, pleural plaques, and shortness of breath. For a detailed description of asbestosis, see *Porter v. American Optical Corp.*, 641 F.2d 1128, 1132-1133 (5th Cir. 1981). The defendants and third-party defendants are or once were manufacturers of asbestos insulation products.

Asbestos products generally have wrought widespread and monstrous suffering. It is reported that insurers of asbestos manufacturers now face roughly 16,000 damage suits and that new cases are filed at the rate of 450 per month. During the past forty years, some nine million American workers still alive today were exposed to asbestos, and a study to be published by the Labor Department estimates that at least 8,500 workers—perhaps as many as 10,000—will die each year until the end of this century from asbestos-related cancers. Wall St. J., June 14, 1982, at 1, col. 6 (Midwest Ed.).

The district court consolidated the ten cases for pretrial purposes. The defendants and third-party defendants moved for summary judgment in nine of the actions based on Wisconsin's three-year statute of limitations for personal injury and wrongful death, Wis. Stat. §§ 893.14, 893.205(1), and 893.205(2) (1977). The district court denied the motions, but certified that its denial "involves a controlling issue of law as to which there is a substantial ground for difference of opinion, and an immediate appeal therefrom may materially advance the ultimate termination of the litigation." Order of April 6, 1981 at 9. We then permitted these interlocutory appeals pursuant to 28 U.S.C. § 1292(b).

I

There is no dispute that Wisconsin law governs these causes of action and that Sections 893.14, 893.205(1), and 893.205(2) of the 1977 Wisconsin Statutes comprise the applicable statutes of limitations.[1] Those sections provide:

> 893.14 Actions, time for commencing.
>
> The following actions must be commenced within the periods respectively hereinafter prescribed after the cause of action has accrued * * *.
>
> 893.205 Within 3 years.
>
> Within 3 years:
>
> (1) An action to recover damages for injuries to the person * * *.
>
> (2) An action brought to recover damages for death caused by the wrongful act, neglect or default of another * * *.

The dispute underlying the motions for summary judgment concerns when a cause of action for asbestos-caused injuries "has accrued" within the meaning of these statutes and thus when the three-year period has begun running.

Wisconsin law is well established up to a point. "A cause of action accrues when there exists a claim capable of present enforcement, a suable party against whom it may be enforced, and a party who has a present right to enforce it." *Barry v. Minahan*, 127 Wis. 570, 573 (1906). In order to have "a claim [in tort] capable of present enforcement," the Wisconsin Supreme Court has held the plaintiff must have suffered "an injury," or

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[1] Effective July 1, 1980, Sections 893.14, 893.205(1), and 893.205(2) of the 1977 Wisconsin Statutes were repealed and replaced by new Sections 893.04 and 893.54. 1979 Wis. Laws, ch. 323, § 28. Except for an amendment concerning medical malpractice actions (new § 893.55), the new statutes are essentially the same as those quoted in the text. Personal injury and wrongful death actions must be commenced "within 3 years" (new § 893.54) "from the time that the cause of action accrues" (new § 893.04).

"damages." See, *e.g.*, *United States Fire Ins. Co. v. E.D. Wesley Co.*, 105 Wis.2d 305, 316 (1982); *Holifield v. Setco Industries, Inc.*, 42 Wis.2d 750, 755 (1969). The problem in the instant cases is to fix a time during the course of the plaintiffs' progressive development of asbestos-caused disease when the plaintiffs were "injured" and the limitations period began running.

There are roughly three different times during the course of an asbestos disease when a plaintiff might be deemed to have received the injury that starts the limitations period: when (or while) the plaintiff is exposed to asbestos, when the plaintiff's disease is first medically diagnosable, or when the plaintiff's disease has manifested itself by symptoms such as shortness of breath that should or in fact do alert the plaintiff to the presence of a disease. Although no Wisconsin case is directly in point, the cases tend to support the second of these times, so that a cause of action accrues when the disease becomes diagnosable. Because of the importance of the question, we would have preferred to certify it to the Wisconsin Supreme Court, but no such procedure exists.

II

The district court held that the relevant injury occurs simultaneously with exposure and, presumably because continued exposure entails continued injury, that the statute of limitations begins to run at the date of the plaintiff's last exposure to asbestos. Order of January 9, 1981 at 7. Third-party defendant Owens-Illinois, which is the only party on appeal to support the district court's theory, gives two reasons for deeming injury to occur with exposure: (1) "the mere presence of asbestos fibers constitutes an insult to the body" and (2) damage to the lungs often begins "shortly after the initial inhalation of asbestos fibers." Brief at 7.

There is some support in the Wisconsin cases for holding that a cause of action accrues when the body is invaded by a foreign substance. *E.g.*, *Peterson v. Roloff*, 57 Wis.2d 1 (1973) (remnant of gallbladder and gauze left in abdomen); *McCluskey v. Thranow*, 31 Wis.2d 245

(1966) (eight-inch metal hemostat left in abdomen). In those cases, the Wisconsin Supreme Court has held that the injury occurred at the time the foreign object was placed in the body, rather than when the plaintiff began suffering from the implantation, *Peterson v. Roloff*, 57 Wis.2d at 3-7, or eventually discovered the presence of the foreign object. *McCluskey v. Thranow*, 31 Wis.2d at 248-249. The Wisconsin Supreme Court has been clear, nevertheless, that "the date of the negligent act [*i.e.*, when the foreign object invades the body] is not necessarily the benchmark for the commencement of a period of limitations. Only in the event the injury occurs on the same date can it be said the cause of action then 'accrues.'" *Olson v. St. Croix Valley Memorial Hospital, Inc.*, 55 Wis.2d 628, 632 (1972). The Court has been even more careful in defective products cases to distinguish the dates of negligence and injury. "Even if the negligence that caused the injury occurred substantially in the past, as in products liability cases, the period of limitations commences to run from the time of injury, and not from the time of the negligent act or omission * * *." *United States Fire Ins. Co. v. E.D. Wesley Co.*, 105 Wis. 2d 305, 311 (1982) (quoting *Rosenthal v. Kurtz*, 62 Wis. 2d 1, 6 (1974)).

Thus the "injury" that starts the clock running is not the defendants' allegedly wrongful act of exposing the plaintiffs to asbestos, but instead the onset of harm to each plaintiff sufficient that "he can come into court, plead and prove certain facts and secure the relief requested." *Holifield v. Setco Industries, Inc.*, 42 Wis.2d 750, 754, 755-756, 758-759 (1969). In the medical malpractice cases so far to come before the Wisconsin Supreme Court, the malpractice and the harm have been coincidental. In each case, the injury has been sufficiently established at the time of the malpractice that a plaintiff could bring suit immediately without his damages being too speculative to permit recovery. For example, even if a hemostat were causing no present discomfort, the plaintiff could sue immediately for removal of it from his abdomen.

On the contrary, as we understand the matter, not all persons who are exposed to asbestos contract asbestosis or the other asbestos-related diseases, and at the outset it often is impossible to diagnose which of the persons exposed to asbestos will eventually contract a disease. As the district court found, "the reaction of persons exposed to asbestos dust is highly individual and * * * not all persons exposed contract a disabling injury." Order of January 9, 1981 at 3; see also *Eagle-Picher Industries, Inc. v. Liberty Mutual Ins. Co.*, 51 L.W. 2025 (1st Cir. 1982). Thus even persons who will eventually become ill may be unable to come into court immediately after exposure to asbestos, because at that time their illness is only a possibility.

Among the cases cited by Owens-Illinois, *Olson v. St. Croix Valley Memorial Hospital, Inc.*, 55 Wis.2d 628 (1972), comes closest to holding that a cause of action may accrue even though whether there will be harm remains speculative. In *Olson*, the plaintiff was given a transfusion of the wrong type of blood in 1962, which allegedly affected her ability to bear children. In 1966, she gave birth to a child that lived for only seven hours, and in 1969, she delivered a stillborn child. The plaintiff did not bring her action based on the negligent transfusion until 1970. The Wisconsin Supreme Court held that the action was barred by the three-year statute of limitations, the majority finding that the injury occurred at the time of the transfusion and a two-Justice concurrence finding that the injury occurred when the first child died.

The transfusion of bad blood in *Olson* is similar to the inhalation of asbestos fibers in these cases because in each case the plaintiff's worst damages were realized subsequent to the foreign substance entering the body. But the transfusion in *Olson* did not initiate a progressive illness. If an injury occurred at all (the Wisconsin Supreme Court expressed some doubt since the plaintiff bore a third and healthy child in 1967, 55 Wis.2d at 634), it must have happened at the time the plaintiff received the faulty transfusion. The alleged in-

jury occurred to the plaintiff's *capacity* to bear children, which, according to her complaint, was impaired at the time of the transfusion. Assuming that her inability to bear children was immediately diagnosable, the *Olson* plaintiff could have brought suit for her injury at any time within three years of the transfusion. In the instant case, the asbestos-caused injury ordinarily is not even diagnosable, let alone provable in court, until some undetermined time after the plaintiff's initial exposure to asbestos.

As noted above, a cause of action cannot accrue until "there exists a claim capable of present enforcement." *Barry v. Minahan*, 127 Wis. at 573. It would be most unfair to hold that the period of limitations had begun running before the plaintiff can possibly prove a cause of action, although as the *Olson* case demonstrates, the plaintiff's awareness of the injury is another matter. Moreover, the Wisconsin Constitution may prevent our construing the statute of limitations to cut off the plaintiff's right to sue for damages prior to a time when the plaintiff could prove the existence of an injury. See Wis. Const. art. 1, § 9 ("Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character * * *"); *Kallas Millwork Corp. v. Square D Co.*, 66 Wis.2d 382, 393 (1975); *Rosenthal v. Kurtz*, 62 Wis.2d 1, 8 (1974). Accordingly, in cases where no ascertainable damages occurred until sometime after the wrongful act of the defendant—primarily defective product cases—the Wisconsin Supreme Court has held that the period of limitations does not begin running until there are indeed damages. See, *e.g.*, *Wisconsin Natural Gas Co. v. Ford, Bacon & Davis Constr. Corp.*, 96 Wis.2d 314 (1980) (cause of action for negligent installation of pipeline accrues when cathodic protection begins shorting); *Abramowski v. Wm. Kilps Sons Realty, Inc.*, 80 Wis.2d 468 (1977) (action for negligent home construction accrues when basement walls and foundation crack and cave in); *Hartford Fire Ins. Co. v. Osborn Plumbing & Heating, Inc.*, 66 Wis.2d 454 (1975) (action for negligent installation of heater accrues at time of fire); *Holifield v.*

Setco Industries, Inc., 42 Wis.2d 750 (1969) (action for wrongful death accrues when defective grinding wheel explodes). Therefore we hold that the limitations period does not necessarily begin at the time of plaintiff's exposure to asbestos and that the apparent premise of the district court's decision—that injury and exposure are simultaneous—is incorrect.[2]

III

The plaintiffs contend that merely suffering diagnosable damages is insufficient to commence the period of limitations. They argue that the period of limitations should not begin running until they know that they have been injured or, alternatively, until the injury in some noticeable way impairs their health so that they should know that they have been injured. The plaintiffs apparently argued on behalf of an even stronger version of the "discovery rule" before the district court, *viz.*, that the cause of action does not accrue until "a plaintiff knew or should have known that he had a compensable injury contracted as a result of exposure to asbestos dust." Order of January 9, 1981 at 2.

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[2] Absent Wisconsin judicial precedent, the district court's decision that a cause of action accrues upon the plaintiff's last exposure to asbestos could be justified because the time of last exposure can be determined more certainly than any of the other suggestions and because that determination would require no expert medical witnesses. *Cf. Insurance Co. of North America v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1230-1231 (6th Cir. 1980) (dissent's suggestion that asbestosis be deemed to occur ten years from date of first exposure), certiorari denied, 50 U.S.L.W. 3466. Such linedrawing, however, is best left to either the Wisconsin legislature or the Wisconsin Supreme Court. See *Peterson v. Roloff*, 57 Wis.2d 1, 7 (1973) ("Because of the numerous cases in which the present three-year requirement for commencing an action by a party who is the victim of medical malpractice is too short, we strongly recommend to the legislature that the basic three-year statute for negligence actions due to medical malpractice be amended."); Wis. Stat. § 893.55 (effective July 1, 1980) (ameliorating the statute of limitations in medical malpractice cases).

The defendants and third-party defendants except Owens-Illinois argue for what in most cases would be an earlier date, when the damages are "demonstrable" or "reasonably capable of medical diagnosis." Although we do not make specific findings on the matter, in most of the consolidated cases below plaintiffs apparently had a diagnosable (often diagnosed) injury to their lungs many years before the illness significantly impaired their health and probably before the plaintiffs either knew the cause of their injury or that it would be compensable.

The Wisconsin Supreme Court has not decided a personal injury case involving an asbestos-caused or progressively disabling disease, but its other decisions indicate clearly that the plaintiff's actual knowledge that an injury has occurred or knowledge of the cause of the injury is irrelevant to when a cause of action has accrued. See *e.g.*, *Wisconsin Natural Gas Co. v. Ford, Bacon & Davis Constr. Corp.*, 96 Wis.2d 314, 324 (1980) ("The injury need not * * * be of such magnitude as to identify the causal factor"); *Peterson v. Roloff*, 57 Wis.2d 1 (1973); *Olson v. St. Croix Valley Memorial Hospital, Inc.*, 55 Wis.2d 628 (1972). Similarly, whether a plaintiff knows that an injury is compensable under some legal theory has not been a factor in deciding when the cause of action accrues. *Cf. Boehm v. Wheeler*, 65 Wis.2d 668, 679-680 (1974) (plaintiff's ignorance of legal malpractice does not toll statute of limitations). The Wisconsin Supreme Court has hinted that its prior cases preclude it from adopting a discovery rule "in [medical] malpractice cases only," *Rosenthal v. Kurtz*, 62 Wis.2d 1, 13 (1974); however, the Court's practice has been to defer any such extension of the limitations period to the Wisconsin legislature. *E.g.*, *Peterson v. Roloff*, 57 Wis.2d 1, 7 (1973). At about the same time that it adopted a discovery rule for medical malpractice cases, the Wisconsin legislature considered and rejected a discovery rule to apply in all types of personal injury actions. 1979

Assembly Bill 327 (introduced March 21, 1979; defeated Nov. 11, 1979).[3] We doubt that the Wisconsin Supreme Court would now contradict the legislature's apparent resolution of the question. See *Boehm v. Wheeler*, 65 Wis.2d 668, 680 (1974) (considering legislature's failure in 1973 to enact discovery rule statutes as a reason not to adopt a judge-made discovery rule).[4]

The harder question is what quantum of damages must be sustained for the cause of action to accrue. Specifically, we must decide whether the cause of action accrues only when the disease has progressed to the stage that it actually impairs the plaintiff's wellbeing or otherwise is noticeable to the plaintiff, or instead when the plaintiff could first prove that he has the disease through medical diagnosis. As noted above, the plaintiffs argue for a time when the plaintiff suffers some noticeable impairment, while the defendants (except Owens-Illinois) argue for when the disease is first diagnosable. In the medical malpractice cases decided prior to enactment of the new discovery rule statute, the Wisconsin Supreme Court stated that the limitations period begins when the injury was diagnosable without regard for any noticeable impairment to the plaintiff.

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[3] The defeated bill would have provided, in pertinent part: "an action to recover injuries to the person shall be commenced within 3 years after the person injured discovers the injury or reasonably should have discovered the injury whichever first occurs, or be barred."

[4] The plaintiffs cite cases from other jurisdictions, in particular *Karjala v. Johns-Manville Prods. Corp.*, 523 F.2d 155 (8th Cir. 1975) (construing Minnesota law), in order to suggest that a discovery rule is better law. However, the result we have reached is strongly entailed by the Wisconsin precedents and therefore we do not need to consider the balance struck by other states between the policies "of discouraging stale and fraudulent claims, and * * * of allowing meritorious claimants, who have been as diligent as possible, an opportunity to seek redress for injuries sustained." *Peterson v. Roloff*, 57 Wis.2d at 6. Nor is a discovery rule mandated apparently by various provisions of the federal Constitution. See *Steinhardt v. Johns-Manville Corp.*, 54 N.Y.2d 1008 (Ct. App. 1981), certiorari denied, 50 U.S.L.W. 3915.

We believe that the Wisconsin Supreme Court would apply that standard here also.

For example, in *Olson, supra*, the plaintiff was deemed to have suffered an injury at the time she received the faulty transfusion since it was then that her ability to bear children allegedly was affected. Although the plaintiff was not noticeably impaired until she lost her first child (and she did not in fact notice the impairment until she lost a second child), the Court's opinion implied that if she could prove her cause of action at all, it was provable at the time of the transfusion. The losses of the plaintiff's children were "consequential injuries * * * [which] had no effect on a cause of action already accrued." 55 Wis.2d at 634. Similarly, in *McCluskey, supra*, the plaintiff suffered no impairment from the hemostat lodged in his abdomen and did not learn of its presence until x-rayed in the course of an unrelated examination. Nevertheless, the Court held that the cause of action accrued at the time the hemostat was left in the plaintiff's abdomen. 31 Wis.2d at 250-251.

The plaintiffs' strongest argument that there is no injury until they are noticeably impaired comes from a recent property damage decision authored by Justice Coffey now Circuit Judge Coffey of this Court, *Wisconsin Natural Gas Co. v. Ford, Bacon & Davis Constr. Corp.*, 96 Wis.2d 314 (1980). That case involved a suit by the Wisconsin Natural Gas Company to recover damages caused by the negligent installation of a 14-mile natural gas pipeline. The Gas Company alleged that the contractor was negligent in failing to provide adequate support for the underground pipeline in light of anticipated shifting soil conditions, and that the engineering inspector failed properly to supervise the installation. The damage to the pipeline due to the faulty installation occurred gradually and was evidenced by the increasing occurrence of "casing shorts" which knocked out portions of the pipeline's electrical anti-corrosion mechanism. The plaintiffs in the instant cases point out that the Wisconsin Supreme Court did not hold that the Gas Company's cause of action accrued at the time that the

first casing short occurred, which would have barred the action under the applicable statute of limitations. Rather, the Court found "that the discovery of a single casing short, in a relatively new pipeline, is not 'sufficiently significant' to alert the Gas Company to the possibility of major defects throughout the entire 14 mile pipeline." 96 Wis.2d at 325 (quoting *Tallmadge v. Skyline Construction, Inc.*, 86 Wis.2d 356, 359 (Ct. App. 1978)). Based on that language, the plaintiffs here contend that their causes of action accrued only "when the evidence of injury * * * [became] sufficiently significant to alert the injured party to the possibility" of an asbestos-created disease. 96 Wis.2d at 324 (quoting *Tallmadge*, 86 Wis.2d at 359).

In any event, it is irrelevant whether the evidence of injury leads the plaintiff to realize that the disease was caused by exposure to asbestos. The portion of the *Tallmadge* opinion quoted by the Wisconsin Supreme Court continues: "The injury need not, however, be of such magnitude as to identify the causal factor." *Id.* But a test that looks for evidence of an injury "sufficiently significant to alert" plaintiffs might be appropriate in the instant cases *provided* the plaintiffs here were as diligent in searching for disease as the Gas Company had been in searching for damage to its pipeline. Justice Coffey began his opinion with a detailed statement of the Gas Company's efforts to protect its pipeline and detect malfunctions:

> Construction of the pipeline was commenced in January, 1968 and became operational in September of the same year. Two months thereafter, in November, shortly after the pipeline was operational, the Gas Company conducted a survey to test for possible corrosion. Following this survey, in early 1969 (March or April), the utility retained the Harco Corporation (Harco), a corrosion engineering firm specializing in cathodic protection, to conduct a more extensive corrosion survey and to assist in developing a system of cathodic protection on the pipeline. In May of 1969 Harco

located one casing short at a street crossing but concluded that the pipeline could be cathodically protected from corrosion "with little difficulty." Harco then designed and installed a system of cathodic protection to prevent further corrosion to the pipeline. In January, 1970, after the cathodic protection process was in operation, Harco recommended a yearly survey of the system. The Gas Company, following Harco's recommendation, conducted a second survey in early 1971, and after finding a number of casing shorts, determined that the pipeline could no longer be considered under cathodic protection. As a result of their findings in the 1971 survey, the Gas Company hired a second engineering and consulting firm, the Hinchman Company (Hinchman), to conduct a comprehensive survey of the entire 14 mile pipeline installed less than three (3) years earlier. Hinchman discovered six (6) "shorts" * * * and recommended that the utility clear and repair the underground casing shorts thus necessitating extensive excavation. Hinchman recommended that the utility excavate and repair as opposed to increasing the electrical current of the cathodic protection process because the current was already operating at its maximum level.

As a result of Hinchman's report and recommendation, the Gas Company embarked upon an extensive program of repair and maintenance of the pipeline to clear the "shorts."

96 Wis.2d at 318-319 (footnotes omitted). Since all the evidence of damage was uncovered by or quickly turned over to the expert pipeline-injury detectors hired by the Gas Company, Justice Coffey's standard of what is sufficient to alert the Gas Company to the existence of an injury is essentially the same as what reasonably was diagnosable as an injury.

Justice Coffey went on to find that casing shorts were "'quite a usual phenomena' in the industry" and are often caused by factors other than the improper installa-

tion of the pipeline. 96 Wis.2d at 325. Moreover, to distinguish between a random short and one that portended a serious defect, the Gas Company would be required to dig up the whole length of the pipeline. But Justice Coffey held "[i]t is unreasonable for the defendants to expect or this court to require the plaintiff, the Gas Company, to excavate the entire 14 miles of pipeline less than one year old in May of 1969 at a cost in excess of $400,000 based on their discovery of one single casing short." *Id.* Therefore, "the Gas Company did not actually suffer an injury until a number of 'casing shorts' rendered the cathodic protection process ineffective and necessitated an extensive excavation and repair program to clear the pipeline of the shorts." *Id.*

Analogously, if the plaintiffs here had hired experts in the field of lung care and the experts found symptoms that with the benefits of hindsight might have indicated the presence of a disease but were dismissed at the time as insignificant, the plaintiffs would have a strong argument that no provable cause of action had yet accrued. Moreover, the *Wisconsin Natural Gas* case indicates that a cause of action will not have accrued if a plaintiff failed to undergo expensive or risky medical processes that might have detected the disease but were unreasonable under the circumstances. The appropriate standard for when a cause of action accrues, however, depends on what reasonably should "alert" the plaintiff only if he has been assiduously attentive to his health. We thus regard *Wisconsin Natural Gas* to be an exceptional application of the more general rule that the cause of action accrues when the asbestos-caused disease becomes diagnosable—*e.g.*, provable by medical evidence in court—a standard that ordinarily is independent of what occurrences might attract the plaintiff's attention.

IV

The rule that we believe would be adopted by the Wisconsin courts is quite harsh. As noted above, it appears that most of the plaintiffs had a diagnosable disease more than three years before they brought suit

against the various defendants. We can only hope that the Wisconsin or federal legislatures will enact some measure to compensate these plaintiffs and others like them who are victims of a product that the consuming public for many years wanted manufactured. The consuming public paid a portion of the cost of manufacturing asbestos insulation in the form of its purchase price. The rest of the cost has been paid by the plaintiffs with their health.

We remand to the district court for further proceedings consistent with this opinion.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

OPINION OF THE DISTRICT COURT

Charlotte E. NEUBAUER, personally and as personal representative of the Estate of Clifford S. Neubauer et al., Joy Skofronick, personally and as personal representative of the Estate of Clifford E. Mason, Walter J. Presechnik, Clarence O. Reimer and Mary M. Reimer, Darwin Frank Witkowski, Sr., and Eleanore Witkowski, Clarence P. Lillge and Hertha E. Lillge, Erich E. Eckoldt and Mamie Eckoldt, Robert J. Gaynor and Lavellette Gaynor,

Plaintiffs,

v.

OWENS-CORNING FIBERGLAS CORPORATION, a foreign corporation, et al.,

Defendants.

William GLOBIG and Kathrine A. Globig, Robert A. Wetzel and Grace M. Wetzel,

Plaintiffs,

v.

JOHNS-MANVILLE SALES COMPANY, et al.,

Defendants.

Civ. A. Nos. 77-C-52, 77-C-446, 77-C-491, 77-C-492, 78-C-43, 78-C-44, 78-C-131, 78-C-544, 79-C-117 and 79-C-980.

United States District Court, E. D. Wisconsin.

Decided January 9, 1981.

DECISION AND ORDER

REYNOLDS, Chief Judge.

These actions are product liability suits brought for the recovery of damages for injuries allegedly sustained by the plaintiffs or their decedents as a result of the inhalation of asbestos dust. In the eight cases in which the male plaintiffs contracted asbestosis (C.A. Nos. 77-C-491, 77-C-492, 78-C-43, 78-C-44, 78-C-131, 78-C-544, 79-C-117, and 79-C-980), motions to dismiss and for summary judgment have been brought on behalf of all defendants and third-party defendants. In the two cases in which the decedents of the plaintiffs contracted mesothelioma (C.A. Nos. 77-C-52 and 77-C-446) motions to dismiss and for summary judgment have been brought only as to the claims for damages for medical costs and for pain and suffering but not as to the wrongful death claims.

The issue posed by the pending motions is the proper interpretation of the applicable

state statute of limitations, formerly § 893.205(1), Wis. Stats., which provided that within three years of its accrual, "[a]n action to recover damages for injuries to the person"* must be brought. Former § 893.14, Wis. Stats. (revised and renumbered as § 893.04, Wis. Stats., by the laws of 1979, effective July 1, 1980), which was in effect at the time these actions were commenced, provided:

---

* By the laws of 1979, c. 323, § 28, eff. July 1, 1980, former § 893.205(1), as revised, was renumbered § 893.54, Wis. Stats. (1979). By the same act a separate statute of limitations for medical malpractice actions, § 893.55, Wis. Stats. (1979), was created. Present § 893.54 provides, as did former § 893.205(1), for a three-year statute of limitations for an action to recover damages for injuries to the person. Present § 893.55 provides that a medical malpractice action must be brought within three years of the date of injury, or one year from the date the injury was or should have been discovered but in no event more than five years from the date of injury, or where a foreign object is left in the body within one year from the date the injury was or should have been discovered.

> "The following actions must be commenced within the periods respectively hereinafter prescribed after the cause of action has accrued * * *."

The plaintiffs argue for an interpretation of § 893.205(1) which permits suit to be filed within three years after a plaintiff knew or should have known that he had a compensable injury contracted as a result of exposure to asbestos dust. The defendants and third-party defendants argue variously for a date of injury without regard to whether a plaintiff at the time of injury knew or had reason to know its cause or for a date of last exposure to asbestos-containing products manufactured by a particular defendant or third-party defendant.

The male plaintiffs and the decedents of the female plaintiffs in the Neubauer and Skofronick cases worked for many years with insulation products. The defendants and third-party defendants are all manufacturers of insulation products and at various times made their products with asbestos content. It is

alleged that the plaintiffs and two decedents were exposed during their working years to asbestos-containing insulation products manufactured by some or all of the defendants and third-party defendants and as a result suffered compensable injuries.

The parties agree that asbestosis and mesothelioma are progressive diseases caused by the prolonged exposure to asbestos dust. There appears to be no dispute that the plaintiffs and two decedents contracted one or the other of the two diseases as a result of exposure to asbestos dust. There also appears to be no dispute that a tendency toward pneumonia, shortness of breath, wheezing, pleural calcification, and pulmonary dysfunction may be symptomatic of asbestos-caused disease. Uncontradicted affidavits on file prepared by Dr. John Schluetter, an expert retained by the defendant Johns-Manville Sales Company, establish that asbestos-caused diseases tend to develop over time and, once contracted, may become progressively worse even after

exposure to asbestos dust ceases because of the internal reaction to asbestos fibers lodged in the lungs. An uncontradicted affidavit on file prepared by Dr. Nathan Grossman, an expert retained by the plaintiffs, establishes that the reaction of persons exposed to asbestos dust is highly individual and that not all persons exposed contract a disabling injury. The parties do not agree on what symptoms each plaintiff exhibited at what time nor on the extent of disability suffered by each plaintiff nor on the time when each plaintiff may be said to have suffered a compensable injury. Conflicting affidavits have also been filed regarding each plaintiff's knowledge of his medical condition three years and one day before filing suit.

Because there are no Wisconsin court cases applying § 893.205(1), Wis. Stats., to a plaintiff with a progressive industrial disease, the plaintiffs have pointed out to the court cases of a similar nature which

have arisen in other jurisdictions. Thus, in Karjala v. Johns-Manville Products Corporation, 523 F.2d 155 (8th Cir. 1975), an asbestosis case, the Court held that the applicable statute of limitations did not begin to run until damage sufficient to maintain a cause of action had occurred, the plaintiff's harm had become manifest, and he had reason to know the cause of his harm. See also Borel v. Fibreboard Paper Products Corporation, 493 F.2d 1076, 1102 (5th Cir. 1973), and Insurance Company of North America v. Forty-Eight Insulations, Inc., 451 F.Supp. 1230 (E.D. Mich. 1978), both applying a discovery rule. The third-party defendant Owens-Illinois, Inc., on the other hand, points to several cases which hold that the statute of limitations commences to run on the date of plaintiff's last exposure to the disease-causing substance, that being the date on which the defendant's wrongful conduct ceases. See, e.g., Rowe v. Gatke Corporation, 126 F.2d 61 (7th Cir. 1942) (applying Indiana law

in an asbestosis case and therefore holding that the statute of limitations runs two years "after the last day of the last exposure to the hazards of the disease"); Armour & Company, Inc. v. Mitchell, 262 F.2d 580 (6th Cir. 1958); Simmons v. Mutual Liability Insurance Co., 433 F.Supp. 747 (S.D. Ala. 1976). However, "'Decisions of the courts of other states involving their statutes [of limitations] and prior decisions are of little value in cases arising in Wisconsin under Wisconsin law.'" Koschnik v. Smejkal, 96 Wis.2d 145, 153 n. 6, 291 N.W.2d 574 (1980), citing Reistad v. Manz, 11 Wis.2d 155, 158, 105 N.W.2d 324 (1960). Therefore, it is to the Wisconsin cases interpreting § 893.205(1), Wis. Stats., and the state statutes of limitations in general that this Court must look for guidance in these cases.

For the most part cases which have arisen under § 893.205(1), Wis. Stats., have been medical malpractice cases, and the Wisconsin Supreme Court has uniformly held that in those

cases the statute of limitations begins to run on the date of injury which normally corresponds to the date of the negligent act without regard to the date on which the plaintiff discovered his injury and its cause. See, e.g., Rod v. Farrell, 96 Wis.2d 349, 291 N.W.2d 568 (1980) (holding that in the case of a man who had a congenital hernia repaired in 1955 and did not discover until 1975 when he had exploratory surgery to discover the cause of his wife's failure to become pregnant that during the hernia surgery a portion of his vasa had been removed and he was sterile, the three-year statute of limitations began to run from the date of the hernia surgery); Olson v. St. Croix Valley Memorial Hospital, Inc., 55 Wis.2d 628, 201 N.W.2d 63 (1972) (holding that plaintiff's cause of action accrued in 1962 when she was given a transfusion of the wrong type of blood which allegedly resulted in the birth of a stillborn child in 1969); McCluskey v. Thranow, 31 Wis.2d 245, 142 N.W.2d 787 (1966) (holding

that plaintiff's cause of action accrued in 1956 when a hemostat was left in her abdomen during surgery and not in 1962 when the presence of the hemostat was discovered during routine x-rays). In a product liability action under § 893.205(1), the cause of action is also held to accrue at the time of injury as opposed to the time of the negligent act (the sale of the defective product) or the time of discovery. Holifield v. Setco Industries, Inc., 42 Wis.2d 750, 168 N.W.2d 177 (1969); Denzer v. Rouse, 48 Wis.2d 528, 532, 180 N.W.2d 521 (1970). In most product liability cases the fact of damage will be readily apparent at the time of injury. Holifield v. Setco Industries, Inc., supra. In the medical malpractice area, in contrast, damage is not always apparent at the time of injury. The Court has recognized the inequity of its holding that the statute of limitations may begin to run before the plaintiff has an opportunity to learn of his injury, and seemingly before any compensable damage has

occurred, Olson v. St. Croix Valley Memorial Hospital, Inc., supra, at 635, 201 N.W.2d 63 (concurrence of Justice Hallows), but has held consistently that correction of the inequity must await legislative action. Peterson v. Roloff, 57 Wis.2d 1, 6-7, 203 N.W.2d 699 (1973); Koschnik v. Smejkal, 96 Wis.2d 145, 153-154, 291 N.W.2d 574 (1980).

Outside of the medical malpractice context, the Court also looks to the date of injury and not to the date of the negligent act or the date of discovery. Peterson v. Roloff, supra, at 6, 203 N.W.2d 699. Indeed, the Court has noted that in certain instances, e.g., § 893.19(7) (fraud) and § 102.12 (worker's compensation), the legislature has provided expressly for tolling of a statute of limitations until discovery, and the Court applies the rule of "expressio unius est exclusio alterius" to conclude that, therefore, in other instances the running of the statute of limitations does not await discovery. Peppas v. Marshall & Ilsley Bank, 2 Wis.2d 144, 148-149,

86 N.W.2d 27 (1957). Thus, in Milwaukee County v. Schmidt, Garden & Erikson, 43 Wis.2d 445, 168 N.W.2d 559 (1969), an architectural malpractice and breach of contract action brought pursuant to § 893.19(5), Wis. Stats., it was held that the statute of limitations began to run at the time of the breach even though the plaintiff did not then know or have reason to know of the breach. In Peppas v. Marshall & Ilsley Bank, supra, the Court held that the statute of limitations governing recovery of money paid out under a forged endorsement began to run from the time the sum was deducted from plaintiff's account and not from the time he learned of the forgery. In Denzer v. Rouse, 48 Wis.2d 528, 533, 180 N.W.2d 521 (1970), a legal malpractice action, the statute of limitations began to run on plaintiff's claim against his attorney at the time he bought a parcel of property containing a misdescription in the deed and not at the time he attempted to sell the parcel:

"* * * Since '...a person has a "cause of action" when he can come into court, plead and prove certain facts and secure the relief requested,' his cause of action was then complete, except that he did not know that it then existed. The only missing ingredient was actual knowledge that a mistake in describing the property had been made. The date of gaining such knowledge is the date of discovery. As this court has said, '... That the injury did not become noticeable or was not in fact noticed until a later date is another question....' Tolling of the statute of limitations in this state does not await the time or fact of discovery. When negligence and resultant injury have occurred, the statute starts to run. * * *"

Similarly, in Milwaukee County v. Schmidt Garden & Erikson, supra, at 455, 168 N.W.2d 559, quoting from Ott v. Hood, 152 Wis. 97, 100, 139 N.W. 762 (1913), the Court stated:

"'"A cause of action on contract, whether for damages or otherwise, commences to run from the time of the breach, whether the facts are known to the party having the right or not, and if the latter, whether through ignorance, neglect, or mistake of such party or fraud of his adversary. There is no exception (citing cases).

"'"The inexorable nature of our statutes of limitations is most emphatically illustrated by Pietsch

> v. Milbrath, 123 Wis. 647, 101 N.W. 388, 102 N.W. 342, and, in effect, by all the other cited cases, by use therein of this language from Bank of Hartford County v. Waterman, 26 Conn. 324, 330: 'Ignorance of his rights on the part of a person against whom the statute has begun to run will not suspend its operation. He may discover his injury too late to take advantage of the appropriate remedy. Such is one of the occasional hardships necessarily incident to a law arbitrarily making legal remedies contingent on mere lapse of time.'" (Emphasis added.)"

[1, 2] Applying the general rules set forth above on interpretation of Wisconsin statutes of limitations, it is my opinion that the Wisconsin Supreme Court would hold that the date of injury for a plaintiff who contracts a progressive disease as a result of protracted exposure to a disease-causing substance is the date of his last exposure to the disease-causing substance. Since asbestosis and mesothelioma are caused by a tissue reaction to imbedded asbestos fibers, the final date of inhalation would be the final date of injury without regard to the date on which the symptoms of the disease became

manifest or the date on which the plaintiff had reason to know of his injury or its cause. As stated above, "'"* * *'Ignorance of his rights on the part of a person against whom the statute has begun to run will not suspend its operation [even though] [h]e may discover his injury too late to take advantage of the appropriate remedy. * * *'"' * * *." Milwaukee County v. Schmidt, Garden and Erikson, supra, at 455, 168 N.W.2d 559.

It is also my opinion, however, that because of the nature of the process of contracting asbestosis or mesothelioma, the date of injury is the date of last exposure to the disease-causing substance, i. e., asbestos, without regard to its particular manufacture. The third-party defendant Owens-Illinois, Inc., has moved for summary judgment on the ground that it ceased the manufacture of asbestos-containing insulation products in 1958 and that none of the plaintiffs or their decedents were exposed to products containing asbestos manufactured by it within three years

of filing suit. That argument goes to causation and not to the date of injury, and it is a question of fact to be resolved at trial whether the plaintiffs' exposure to products manufactured by Owens-Illinois, Inc., contributed to their injuries. In other words, because the types of injuries suffered by the plaintiffs in these cases result from prolonged exposure, because earlier exposure may contribute to a subsequent injury, and because, but for the earlier exposure, later exposure to asbestos-containing products might not have resulted in injury to a particular plaintiff, the Court will look to the date of a plaintiff's last exposure to any product containing asbestos to determine the date on which the statute of limitations began to run for his claims against all manufacturers of asbestos-containing products to which he was exposed during his working life. This result is mandated by the nature of the physical process of contracting asbestos-caused diseases. A plaintiff in Wisconsin

must sustain actual damage, and not merely potential damage which never ripened into actual damage, before he may recover. Widemshek v. Fale, 17 Wis.2d 337, 340-341, 117 N.W.2d 275 (1962); Central Mutual Insurance Company v. H. O., Inc., 63 Wis.2d 54, 59, 216 N.W.2d 239 (1974). It is also consistent with the Wisconsin Supreme Court's holding that a manufacturer who sells a defective product may be liable for an indefinite period of time after the sale and, specifically, until the resultant injury has occurred and the plaintiff's cause of action has accrued. Holifield v. Setco Industries, Inc., 42 Wis.2d 750, 757-758, 168 N.W.2d 177 (1969).

[3] This holding is not consistent with the Court's tentative decision announced during the oral argument held on December 12, 1980, which was that in regard to the statute of limitations, a discovery rule would be applied to these cases. Upon reconsideration of the arguments of the parties, the briefs and affidavits submitted, and the case law,

the Court has concluded that Wisconsin law does not recognize the discovery rule in applying its statutes of limitations except where provided for expressly by the legislature. Therefore, this Court, having jurisdiction solely because of diversity, is bound to apply and to follow the law of the State of Wisconsin.

The hearing previously scheduled for January 15 and 16, 1981, to discuss the applicability of the statute of limitations on a case-by-case basis is cancelled. A motion and briefing schedule is established, however, for any summary judgment motions which the parties may wish to bring based upon lack of contact by any plaintiff or her decedent with any product containing asbestos more than three years and one day before filing suit. A schedule is also established in the event any party intends to request certification of this ruling to the United States Court of Appeals for the Seventh Circuit.

For the foregoing reasons,

IT IS ORDERED that the motions for summary judgment of the defendant Johns-Manville Sales Company, of liaison counsel on behalf of all third-party defendants, of the Keene Corporation, of Armstrong Cork Co., of Owens-Corning Fiberglas Corp., and of Owens-Illinois, Inc., for summary judgment are denied.

IT IS FURTHER ORDERED that if any party intends to seek certification of this decision and order to the United States Court of Appeals for the Seventh Circuit, the motion for certification shall be served and filed within fourteen days from the filing date of this order; answering briefs shall be served and filed within twenty-one days of the filing date of this order; and any reply briefs shall be served and filed within twenty-five days of the filing date of this order.

IT IS FURTHER ORDERED that if any party intends to move for summary judgment on the ground of lack of contact with products containing asbestos by any plaintiff within three years and one day of filing suit, such motion

shall be served and filed with supporting material on or before February 16, 1981; answering briefs shall be served and filed on or before March 3, 1981; and any reply briefs shall be served and filed on or before March 9, 1981.

APPENDIX C*

Corporate Information Required by Supreme Court Rule 28.1

Pittsburgh Corning Corp.:

1. Pittsburgh Corning Corp. is a corporation whose shareholders are PPG Industries, Inc. and Corning Glass Works.
2. None
3. None

Jim Walter Corp.:

1. None
2. None
3. None

Celotex Corp.:

1. Jim Walter Corp.
2. None
3. None

Fibreboard Corp.:

1. Louisiana-Pacific Corp.
2. None
3. None

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*Key:

1. = Parent Companies
2. = Subsidiaries (except wholly owned subsidiaries)
3. = Affiliates

GAF Corp.:

1. None
2. None
3. None

H. K. Porter Co. Inc.:

1. None
2. Fansteel Inc.
3. None

Southern-Asbestos Co., n/k/a Southern Testile Corp.:

1. H. K. Porter Co.
2. None
3. None

Forty-Eight Insulations, Inc.:

1. Foster-Wheeler
2. None
3. None

Armstrong Cork Co., n/k/a Armstrong World Industries Inc.:

1. None
2. Armstrong World Industries, Lty of Sydney, Australia
3. None

Nicolet Inc.:

1. NuSN Corp.
2. None
3. None

Standard Asbestos Manufacturing & Insulating Co., n/k/a Standard Insulations Inc.:

1. None
2. None
3. None

Raybestos Manhattan, Inc., n/k/a Raymark Inc.:

1. None
2. None
3. None

Ryder Industries, Inc.:

1. None
2. None
3. None

Owens-Corning Fiberglas Corp.:

1. None
2. None
3. None

Owens-Illinois, Inc.:

1. None

2. Forest Products Corp.

   Marinette Tomahawk & Western Railroad Company

   Maumee Valley Community Urban Redevelopment Corp.

   O-I International Sales Corporation

   Owens-Illinois Development Corporation

   Owens-Illinois Inter-America Corporation

   Sabine River and Northern Railroad Company

   L. E. Smith Glass Company

   Valdosta Southern Railroad Co.

   Treitler-Owens, Inc.

3. None

Atlas Asbestos Co.:

1. Believed to be wholly owned by the Canadian Government.
2. No information was provided to counsel preparing this brief.
3. No information was provided to counsel preparing this brief.

Rock Wool Manufacturing Co.:

1. None
2. No information was provided to counsel preparing this brief.
3. No information was provided to counsel preparing this brief.

Supreme Court, U.S.
FILED
JAN 14 1983
ALEXANDER L. STEVAS
CLERK

No. 82-1010

In the Supreme Court of the United States

October Term, 1982

CHARLOTTE E. NEUBAUER, personally and as personal representative of the Estate of Clifford S. Neubauer, et al,

Petitioners,

-vs.-

OWENS-CORNING FIBERGLAS CORP., et al,

Respondents.

BRIEF OF EAGLE-PICHER INDUSTRIES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE 7TH CIRCUIT

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No. 82-1010

In the Supreme Court of the United States

October Term, 1982

CHARLOTTE E. NEUBAUER, personally and as personal representative of the Estate of Clifford S. Neubauer, et al,

Petitioners,

-vs.-

OWENS-CORNING FIBERGLAS CORP., et al,

Respondents.

BRIEF OF EAGLE-PICHER INDUSTRIES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE 7TH CIRCUIT

INTRODUCTION

The only issue presented by these consolidated cases is solely one of state law. That issue is at what date the injury, for purposes of the Wisconsin statute of limitations, occurred for each of the petitioners and their respective claims. Although these actions have been commenced and continued in the District Court for the Eastern District of Wisconsin, the only claims being made by the petitioners are under the tort law of the State of Wisconsin. Consequently, the defendants' and third-party defendants' motions for summary judgment, at the District Court

level, and the appeals to the 7th Circuit concerned only the question of when the Wisconsin statute of limitations began to "run" with respect to the state tort law claims of the petitioners. As noted by the 7th Circuit, the resolution of that issue required only the determination of the date on which the petitioners were "injured" within the context of Wisconsin law. *Neubauer v. Owens-Corning Fiberglas Corp.*, 686 F.2d 570, 572 (1982), Pet. App. A, p. 6A.

On appeal to the 7th Circuit, the respondents herein, with the exception of Owens-Illinois, Inc., asserted that the "date of injury" under Wisconsin law was the date at which the asbestos-related disease was medically diagnosable. Although fully aware of the position of the respondents from the outset, and while arguing against that position in the 7th Circuit, the petitioners did not claim either that position or the Wisconsin law to be constitutionally infirm. The purported constitutional issue set forth in the petition was not raised until the filing of the petition for rehearing in the 7th Circuit.

However, the true objection raised by the petitioners in the petition is neither a constitutional issue nor an issue related to the statute of limitations. It is merely an objection to the burden of proof imposed upon the plaintiff in any personal injury action in Wisconsin where recovery for potential future damage is sought. As will be shown below, the 7th Circuit decision is a correct application of Wisconsin law to this fact situation and does not violate the United States Constitution or the Wisconsin Constitution.

I. ISSUE RAISED BY PETITIONERS IS NOT WITHIN THE CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI

A review of the petition makes it readily apparent that the argument presented therein does not address any of the considerations for acceptance of the petition, as set forth in Sup. Ct. R. 17.

While the petitioners now assert that these cases present an issue of constitutional law, they did not advance this argument until this matter had been briefed, argued and decided by both the District Court and the 7th Circuit Court of Appeals. Moreover, even a cursory examination of the petitioners' argument illustrates that, in reality, it is simply an attempt to argue a question of state evidentiary law under the guise of a constitutional issue.

The true basis underlying petitioners' argument is not any purported constitutional infirmity in the statute of limitations of the State of Wisconsin, or its construction by the Wisconsin Supreme Court and the 7th Circuit Court of Appeals, but rather the evidentiary burden of proof imposed by the law of the State of Wisconsin upon all individuals claiming damages for permanent or progressive personal injury.

As the petition presents only a question of state law, which is an issue for the legislature of the State of Wisconsin, *see, e.g., Neubauer,* 686 F.2d at 577, Pet. App. A, p. 30A and *Peterson v. Roloff,* 57 Wis.2d 1, 5-7, 203 N.W. 2d 699, 701-702 (1972), it should not be granted.

II. THE 7TH CIRCUIT CORRECTLY APPLIED WISCONSIN LAW

Under the law of the State of Wisconsin, the statute of limitations begins to run at the time the cause of action

accrues. Sec. 893.14, Wis. Stats. (1977). The Wisconsin Supreme Court has interpreted the accrual of a cause of action to be that time when the tortious conduct has resulted in an injury to the plaintiff. *Holifield v. Setco Industries, Inc.*, 42 Wis.2d 750, 168 N.W.2d 177 (1969). It has been further construed as the date on which both the tortious conduct has occurred and an injury has been sustained by the plaintiff. *Peterson,* 57 Wis.2d at 4, 203 N.W.2d at 700-701.

In the instant action, as the Court of Appeals noted, the only question presented was at what point in time the petitioners had been injured, as that term is defined in the law of the State of Wisconsin. *Neubauer,* 686 F.2d at 572, Pet. App. A, p. 6A. In correctly interpreting and applying Wisconsin law, the Court of Appeals determined that the petitioners' causes of action had accrued, and the injury had occurred, at the time the injury was medically diagnosable, i.e., provable in Court, without regard as to whether or not it was known to the petitioners.

> In the medical malpractice cases decided prior to the enactment of the new discovery rule statute, the Wisconsin Supreme Court stated that the limitations period begins when the injury was diagnosable without regard for any noticeable impairment to the plaintiff. We believe that the Wisconsin Supreme Court would apply that standard here also.

Neubauer, 686 F.2d at 575, Pet. App. A, pp. 21-22A.

A. Wisconsin Statute of Limitations Does Not Require Knowledge of Injury by the Plaintiff

The Wisconsin Supreme Court has frequently been presented with the "date of injury" issue in factual settings where an injury occurred and was provable by competent,

admissible evidence many years before that injury was known to the plaintiff or caused disability or other substantial harm to the plaintiff. *See, e.g., Denzer v. Rouse,* 48 Wis.2d 528, 180 N.W.2d 521 (1970) (Attorney Malpractice); *Milwaukee County v. Schmidt, Garden & Erikson,* 43 Wis.2d 445, 168 N.W.2d 559 (1969) (Architect's Negligence); *Peppas v. Marshall & Ilsley Bank,* 2 Wis.2d 144, 86 N.W.2d 27 (1957) (Negligence of Bank); and *Reistad v. Manz,* 11 Wis.2d 155, 105 N.W.2d 324 (1960) (Medical Malpractice).

In deciding the issue of "date of injury" within that context, the Wisconsin Supreme Court has consistently rejected the "discovery rule" and has held that the "date of injury" does not require that the person be aware of the injury or that it be manifested "objectively."

> That the injury did not become noticeable or was not in fact noticed until a later date is another question . . . Tolling of the statute of limitations in this state does not await the time or fact of discovery. (Citation omitted).

Denzer, 48 Wis.2d at 533, 180 N.W.2d at 524.

> The Court reasoned that, in a proper case, the legislature could have tolled the statute of limitations until such time as the injured party might reasonably have discovered the tort, *but the legislature did not see fit to do so.* (Emphasis supplied).

McCluskey v. Thranow, 31 Wis.2d 245, 250-251, 142 N.W.2d 787, 790 (1966).

Although the Wisconsin Supreme Court has never expressly decided this issue within the context of an asbestos-related disease, its prior decisions, involving analogous fact situations, established that it would apply the same rule of law to these cases.

In *Olson v. St. Croix Memorial Hospital,* 55 Wis.2d 628, 201 N.W.2d 63 (1972), the plaintiff received a transfusion of blood with an improper Rh factor. That transfusion took place in 1962. She was unaware of the fact that the Rh factor she received was improper and suffered no "objective injury" until 1966 when she delivered a child who lived only seven hours. No further "objective injury" occurred until 1969 when she delivered a stillborn child.

In sustaining the trial court's dismissal of the action, which was commenced in 1970, based upon the statute of limitations, the Wisconsin Supreme Court held:

> Under the facts alleged, the first injury occurred in 1962. That injury commenced the period of limitations. Subsequent consequential injuries alleged to have occurred in 1966 had no effect on the cause of action already accrued.

Olson, 55 Wis.2d at 633-634, 201 N.W.2d at 65.

The Wisconsin Supreme Court has recently addressed this rule of law in *Rod v. Farrell,* 96 Wis.2d 349, 291 N.W.2d 568 (1980). Therein the plaintiff underwent surgery in 1955 for repair of a congenital hernia at which time, unknown to anyone, a portion of his vasa was removed. In 1975, it was discovered that plaintiff was sterile as a result of the removal of his vasa during the 1955 surgery. In 1976, he commenced a medical malpractice action against the physician who performed the surgery. The Wisconsin Supreme Court again sustained the dismissal of the action due to the expiration of the Wisconsin statute of limitations prior to the commencement of the action in 1976.

Similar results have also been reached in *McCluskey v. Thranow, supra,* where the plaintiff learned in 1962

that a hemostat had been left in his body during a surgical procedure performed in 1955, and in *Peterson v. Roloff, supra,* where the plaintiff learned in 1971 that a 1954 gallbladder operation had not been properly performed and that gauze had been left in her body at that time.

B. 7th Circuit Decision is Consistent With and Mandated by Wisconsin Law

On appeal, the 7th Circuit in the instant action was presented with arguments which asserted three separate standards by which the "date of injury" was to be determined. The first was the date of exposure to asbestos fiber, urged by Owens-Illinois, Inc., which was premised on the proposition that any inhalation of asbestos fiber causes injury to the lungs. The second standard was the date the asbestos-related disease became medically diagnosable, urged by all respondents other than Owens-Illinois, Inc., since at that point in time a physician could diagnose the disease and the plaintiff could prove injury and damage as a result of the exposure to asbestos. The third standard, forwarded by petitioners, was the time at which each plaintiff actually discovered he or she had asbestos-related disease or was physically impaired thereby.

In resolving the issue, the 7th Circuit adopted the only standard supportable by the law of Wisconsin — the date the asbestos-related disease was medically diagnosable. Although on petition for rehearing, the petitioner appeared to argue that the 7th Circuit decision misapplied Wisconsin law, it is clear that they no longer make that argument.

The decisions of the Wisconsin Supreme Court in virtually identical fact situations allow no conclusion other than that reached by the 7th Circuit.

III. WISCONSIN STATUTE OF LIMITATIONS NEITHER DEPRIVES PETITIONERS OF A REMEDY AT LAW NOR OF DUE PROCESS

Utilizing the date the asbestos-related disease becomes medically diagnosable, neither deprives the petitioners of property without due process of law nor deprives them of a remedy for a wrong under Art. I, sec. 9 of the Wisconsin Constitution. Petitioners argue, in essence, that the mere existence of a statute of limitations is unconstitutional. They begin with the proposition that as of the date of diagnosis, they had no provable disability. (Pet. pp. 25-26). Petitioners then argue that only when physical impairment from the disease has manifested itself does a plaintiff have "sufficient" proof of damages. Petitioners then assert that allowing the statute of limitations to commence running before that date is unconstitutional.

The flawed reasoning of petitioners' argument is readily apparent. For example, they have not seen fit to define "disability or impairment," but with good reason. Most, if not all, of the testimony as to the dates the petitioners' asbestos-related disease was medically diagnosable is based upon dysfunction or impairment determined as a result of medical examination and testing. Even if that dysfunction or impairment does not prevent a petitioner from pursuing his normal trade or occupation, does it not constitute a disability?

The most serious flaw in petitioners' reasoning occurs at the start of this sequence, however. Petitioners have overlooked the fact that, under Wisconsin law, at the time the injury occurs to one's body, and is medically diagnosable, damage has occurred. Petitioners have consistently ignored the distinction between injury as damage and the extent of injury as the extent of damage. Once that dis-

tinction is made, and it must be made under Wisconsin law, it is readily apparent that they are not deprived of either due process or a remedy at law.

A. A Statute of Limitations is a Matter of Legislative Policy

Both this Court and the Wisconsin Supreme Court have recognized that a statute of limitations involves the resolution of two competing considerations.

> These enactments are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, . . . (Citations omitted).

United States v. Kubrick, 444 U.S. 111, 117 (1979).

> Two conflicting policies confront each other when statutes of limitations are presented: (1) That of discouraging stale and fraudulent claims, and (2) that of allowing meritorious claimants, who have been as diligent as possible, an opportunity to seek redress for injuries sustained. (Citations omitted).

Peterson, 57 Wis.2d at 6, 203 N.W.2d at 702.

Both Courts have similarly recognized that the resolution of these considerations is a questtion of legislative policy.

> Statutes of limitations, . . . represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that "the right to be free of stale claims in time comes to prevail over the right to prosecute them." (Citation omitted).

Kubrick, 444 U.S. at 117.

> But whatever may have been the reasons that induced the enactment of the statute of 1885, the period within which actions must be brought was a matter resting primarily with the legislative department of the state government; and as statutes of limitation have for their object, and are deemed necessary to, the repose and security of society, the determination of that department should not be interfered with by the courts, unless the time allowed to bring suits upon existing causes of action is, in view of all the circumstances, so short as not to give parties affected by it a reasonable opportunity to protect their rights under the new law.

Wheeler v. Jackson, 137 U.S. 245, 256 (1890).

> The question of what the statute of limitations should be as to any cause of action is a question of public policy. . . .
>
> We conclude that this is a matter peculiarly for legislative determination.

Peterson, 57 Wis.2d at 6-7, 203 N.W.2d at 702.

Although expressed in somewhat different language, both Courts have recognized the legislature's prerogative in this area, subject only to applicable constitutional limitations. Both Courts have expressed the constitutional standard in essentially identical form. Compare *Wheeler, supra,* with *Bekkedal v. Viroqua,* 183 Wis. 176, 196 N.W. 879 (1924), wherein the Wisconsin Supreme Court stated the standard as:

> . . . statutes of limitation are not subject to constitutional objections if a reasonable time within which the remedy may be invoked is provided by the statute. (Citations omitted).

Id. at 185, 196 N.W. at 882.

Before addressing the particular facts presented by these cases, two factors should be noted.

First, the 7th Circuit took note in its decision of two considerations critical to that decision. First, it pointed out that it would be "unfair" to hold that the period of limitations began to "run" before the plaintiff could possibly prove a cause of action. Secondly, the 7th Circuit noted that the Wisconsin Constitution, specifically Art. I, sec. 9, may prevent a statute of limitations from being construed so as to terminate the plaintiff's right to sue prior to the time plaintiff could prove the existence of an injury. *Neubauer,* 686 F.2d at 573, Pet. App. A, pp. 13-14A. Petitioners argue that, after noting those crucial considerations, the 7th Circuit then issued a decision which violated both.

Secondly, the Wisconsin Supreme Court has evaluated and rejected, on several occasions, the arguments made by petitioners herein.

In *Rod vs. Farrell, supra,* the plaintiff argued, as petitioners do here, that the Wisconsin statute of limitations deprived him of due process and violated Art. I, sec. 9 of the Wisconsin Constitution.

In rejecting the argument referrable to the Wisconsin Constitution, the Wisconsin Supreme Court held:

> This court has said that although Art. I, sec. 9, Wisconsin Constitution, guarantees a suitor a day in court of competent jurisdiction to which he may present his claim, the statute of limitations may bar a plaintiff's action and the defending party may rely on the statutory bar. (Citations omitted).

Id. at 355-56, 291 N.W.2d at 571.

> In the instant case, however, the plaintiff's injury occurred at the time of the operation. Many years have elapsed before the statute of limitations barred plaintiff's claim. Consequently, we conclude that the

> statute of limitations does not violate Art. I, sec. 9, Wisconsin Constitution.

Id. at 356, 291 N.W.2d at 571. *See also, Reistad v. Manz,* 11 Wis.2d 155, 105 N.W.2d 324 (1960).

In rejecting the argument that the Wisconsin statute of limitations denies the plaintiff due process as guaranteed by the United States Constitution, the Wisconsin Supreme Court relied, in part, upon *Clark v. Gulesian,* 429 F.2d 405 (1st Cir. 1970). In *Clark,* the plaintiff argued that the Maine statute of limitations, which began to "run" at the time of the negligent act, deprived him of due process. The 1st Circuit, in rejecting that position, noted that the result may be unfortunate for that particular plaintiff but:

> . . . the state may reasonably recognize that a defendant has an interest in repose, and in the avoidance of stale claims, however free from fault the claimant's delay may be. *Such a conclusion does not deprive the plaintiff of any constitutional right to fair or equal treatment.* (Emphasis supplied).

Id. at 406.

The Wisconsin Supreme Court similarly rejected the denial of due process argument stating:

> This argument is similar to the one made under Art. I, sec. 9 of the State Constitution, and we find it similarly unpersuasive.

Rod, 96 Wis.2d at 357, 291 N.W.2d at 572.

B. Wisconsin Statute of Limitations is Constitutional

The standard applied to these cases by the 7th Circuit, as mandated by Wisconsin law, is that at the time the petitioners' asbestos-related disease was medically diagnos-

able their respective causes of action had accrued and the applicable statute of limitations began to "run."

At the point in time the asbestos-related disease was medically diagnosable, the petitioners had, not only injury and damage, but also *proof* of that injury and damage. The petitioners then had *three years* within which to commence their actions before the statute of limitations expired. Sec. 893.205(1) and (2), Wis. Stats. (1977). The legislative decision to require the commencement of suit within three years of the date of the occurrence of personal injury or death is not, by any stretch of the imagination, unreasonable.

Petitioners, in fact, do not argue that the three year time period is unreasonable. Instead they argue that they should not be required to start suit when they are, or were, first injured. That position is based upon their assertion that the injury, at least at first, may not be causing actual physical impairment (Pet. p. 23), i.e. the potential dollar value of the present and past damages at that time may not be large. They then ask this Court to create an exception in the law of Wisconsin for them. Specifically they ask that the Wisconsin statute of limitations, as applied to them, not start to run until they have sustained manifested "physical impairment" (Pet. p. 29), presumably so that the potential dollar value of their present and past damages will be increased.

The petitioners attempt to justify this position by arguing that if they are required to start suit when their injury or damage is first medically diagnosable, they may be unsuccessful in proving to a jury that their injury and damage may progress and cause additional injury and damage in the future. (Pet. pp. 23-25). Yet this same potential

result confronts every plaintiff with a progressive or permanent personal injury claim in Wisconsin. Every plaintiff who seeks recovery for alleged future consequences of an injury must prove the consequences alleged by a preponderance of the evidence. *Sufferly v. Heyl & Patterson,* 139 Wis. 510, 121 N.W. 251 (1909). The law, as applied to these petitioners, is no different than the law applied to all other personal injury claimants in Wisconsin.

The petitioners also ignore the fact that even if their standard were adopted, they are confronted with the same evidentiary burden. The petitioners herein have alleged future damages, and, even if their actions were allowed to proceed, they would face the same uncertainty with respect to their claims for future damages. The fact that a plaintiff does or does not have "manifest physical impairment," whatever petitioners intend that to mean, has no effect whatsoever on the evidentiary burden faced by the plaintiff in proving future damages.

The suggestion that allowing the petitioners to delay suit until they have a "manifest physical impairment" will somehow ensure or more readily enable them to recover for alleged future damage is a false premise for a non-existent constitutional argument.

That situation is further aggravated in that, as noted previously, the petitioners have not defined what would constitute "manifest physical impairment," apparently wishing to reserve to themselves the decision as to when the damages are of sufficient value to activate the statute of limitations. Such a result would violate the considerations involved in establishing the statute of limitations as recognized by both this Court and the Wisconsin Supreme Court.

The 2nd Circuit Court of Appeals has recently rejected an argument similar to petitioners under even more aggravated circumstances. *Ornstein v. Regan, et al,* 604 F.2d 212 (2nd Cir. 1979). Ornstein sustained an injury during the course of his employment for the Board of Education for the City of New York. Upon learning those injuries permanently disabled him, he filed an application for retirement based upon permanent disability. That application was denied in that the rules and regulations of the Retirement System required that such an application be filed within two years of the happening of the accident which had not been done. The plaintiff argued that since he did not know he was permanently disabled within two years of the happening of the accident, the two year time limitation should run from the date he learned he was permanently disabled. When the courts of the State of New York sustained the position of the Board of Education, he commenced this action alleging the application of that limitation was unconstitutional as it deprived him of due process of law.

In rejecting that argument, the 2nd Circuit held:

> Limitation periods are designed to eliminate stale claims. They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable (sic) and unavoidable delay. They sometimes expire before a claimant has sustained any injury, or before he knows that he has sustained an injury. (Citations omitted).

Id. at 214.

The 2nd Circuit specifically held that periods of limitation are not unconstitutional merely because they create seemingly unfair results in certain instances.

> The legislative body which enacts the limiting legislation may avoid unfair results by incorporating ap-

> propriate tolling provisions. Its failure to do so does not make the limitation unconstitutional. (Citation omitted).

Id. at 214.

As recognized by the 7th Circuit, at the time the asbestos-related disease is medically diagnosable, the plaintiff *can* prove a cause of action, including injury and damage. The petitioners' argument ignores the fact that once the disease is medically diagnosable, injury and damage have occurred. While the extent of injury in any given plaintiff at that point in time may vary, there is nevertheless an injury, damage and an accrued cause of action: there is a claim capable of present enforcement, a suable party against whom it may be enforced and a party who has a present right to enforce it. This is the objective standard established in Wisconsin law for determining when the statute of limitations begins to "run." *Barry v. Minahan,* 127 Wis. 570, 573, 107 N.W. 448, 490 (1907).

In this context, it is apparent that the crux of the petitioners' argument simply goes to the extent of damage which may be proven at that date. While the disease may subsequently produce further injury and damage, this is simply a consequence of the disease and it has absolutely no effect or bearing on the date of injury determination. *See, e.g., Olson,* 55 Wis.2d at 633-34, 201 N.W.2d at 65. As *Olson* illustrates, this evidentiary issue is not unique to asbestos-related diseases but is one faced by all plaintiffs who are suing for personal injuries and potential future damages.

The argument presented in the petition is manifestly unsound. In effect, the petitioners are asking that they be the ones to determine at what point in time the statute of limitations begins to run, a proposal which is unrea-

sonable, unworkable and unfair. The evidentiary burden and subsequent trial uncertainty, which is the base of the petitioners' argument, is confronted by all plaintiffs in personal injury actions seeking recovery for potential future damages. The petitioners have not explained, and indeed cannot, why they should be excepted from this burden and uncertainty. In fact, as noted previously, most of the petitioners in these consolidated cases continue to face that evidentiary burden and trial uncertainty set forth in the petition. Accepting their view of the statute of limitations would not, as suggested in the petition, relieve them of that evidentiary burden and subsequent trial uncertainty.

C. 7th Circuit Correctly Disregarded Authority From Other Jurisdictions

Petitioners' final argument is that the 7th Circuit should have adopted the view of the 8th Circuit in *Karjala v. Johns-Manville Products Corp.*, 523 F.2d 155 (1975). In its decision in *Karjala,* the 8th Circuit specifically noted it was governed by Minnesota law and was relying on Minnesota law in reaching its conclusion. *Id.* at 160. The 7th Circuit properly relied on Wisconsin law in making its determination in this case, which reliance was mandated by *Erie Railroad v. Tompkins,* 304 U.S. 64 (1958).

The well-reasoned decision of the 7th Circuit Court of Appeals was obviously made after a lengthy and thorough consideration of the issue which was presented to it and the applicable Wisconsin law. The decision applies Wisconsin law in the same manner as it has been consistently applied by the Wisconsin Supreme Court. The decision of the 7th Circuit does not require these petitioners, or any

other person, to start litigation before a cause of action has accrued and does not force petitioners, or any other person, to start suit before they have a provable cause of action.

CONCLUSION

The petition for a writ of certiorari does not present an issue which warrants the granting of the writ.

The issue presented is purely one of state law and the 7th Circuit Court of Appeals has correctly applied the law of the State of Wisconsin in these consolidated cases.

The petitioners contend that the 7th Circuit Court of Appeals' decision requires them to commence suit at such a time that it violates Art. I, sec. 9 of the Wisconsin Constitution and deprives them of due process under the United States Constitution. However, an examination of the law of the State of Wisconsin and the decision of the 7th Circuit demonstrates that the decision of the 7th Circuit Court of Appeals herein does *not* require the petitioners to commence suit until such time as they have medically diagnosable, and therefore provable, injury and damage, and does not require them to commence an action until such time as they can plead and prove a cause of action. From that point in time, three years are allowed by Wisconsin statute to commence litigation.

The respondent respectfully submits that, as previously determined by the Wisconsin Supreme Court, the Wisconsin statute of limitations does not violate Art. I, sec. 9 of

the Wisconsin Constitution or deprive the petitioners of due process under the United States Constitution. Respondent, therefore, respectfully requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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